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President's Page

IT is gratifying to know and be able to report to the membership that the Standing Committees are hard at work, and most of them have selected a topic. I predict that these committee reports will be of great value to the entire membership because of their treatment of live and current topics. It is also expected that some of the committee reports will be used in the Open Forum discussions at White Sulphur next July.

Your Executive Committee is presently engaged in a round-robin discussion of the problems of the Association, and will, at its Mid-Winter meeting, be able to put into effect and operation an Executive Secretary and a workable plan to render valuable assistance to George Yancey, our Editor-in-Chief.

The response of the membership to work has been excellent, and for that I extend my sincerest thanks.

Arrangements have been made to hold the Mid-Winter Meeting at a ranch near San Antonio, Texas, on the dates February 9th through 12th, 1954. The facilities of the ranch are somewhat limited, but a few members can be accommodated exclusive of the Executive Committee, so any who desire to attend should contact me as soon as possible, and if there is room at the ranch, reservations will be accepted by me on a first-come, first-served basis.

Sincerely,

J. A. Gooch
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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

Insurance Counsel Journal
PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor*
ELEVENTH FLOOR, COMER BUILDING
BIRMINGHAM, ALABAMA

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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LIBEL AND SLANDER BY PICTURE

I regret to announce that the picture of President Gooch, which appears in the July Issue of the Journal, has been the subject of charges and counter-charges. A former president made charges against your editor, sending copy of same to the President, that your editor had deliberately published a picture purporting to be the picture of President Gooch, and that the picture was either not the picture of the President, or that it had been so "touched up" by your editor as to make our rugged President from Texas appear to be a "glamour boy." I shall not name the former president who made these charges, but will merely say that he was President in 1948-1949, and that *his* picture appears in the October 1948 Issue of the Journal

I am glad to announce that the "fued" which has been carried on by correspondence now appears dormant. The fued was called off after it appeared that the picture really was the picture of President Gooch. That he had posed for it at the command of his charming and beautiful wife Adrienne Gooch, and that the glamour was reflected from his wife who was present when the picture was taken.

THE EXECUTIVE SECRETARY AND THE JOURNAL

I am sure you have read with interest the announcement made by President Gooch that plans for a permanent office for the Association, an Executive Secretary who will be in charge of this office and perform the detail work of the Secretary and of the Treasurer, and the publication of the Journal, are moving forward satisfactorily.

Your Executive Committee will give prime consideration to these subjects at its Mid-winter Meeting. A complete report will likely appear in the April Issue of the Journal. (President Gooch and the Executive Committee will be happy to receive suggestions from the members prior to the Mid-Winter Meeting of the officers of your Association, which is to be held in February of 1953.)

The Journal Committee and the Executive Committee, have made very substantial progress in selecting and securing regional or associate editors for the Journal. These regional or associate editors from each Reporter System territory will promptly send into the office of the editor, or the executive secretary, copies of opinions of interest in their respective districts, and will secure articles on subjects of interest to you. The plan also contemplates a review of all articles which have heretofore appeared in the Journal, with particular reference to subjects and the preparation of a list of subjects not completely covered, to the end that the Journal will furnish you material for briefs on the many subjects which come before the members for decision and briefing from day to day.

WITHHOLDING TAX CLAIMS UNDER PAYMENT BONDS

If you have not read the able article and brief written by our member T. L. Sedwick of Detroit, Michigan, and published in the April Issue of the Journal, I commend it to you. This article shows the definite trend of the courts in favor of the surety company. Since the publication of Mr. Sedwick's article, he has called my attention to two cases which were decided in June of this year, dealing with Government tax claims under payment bonds, and in which the Government suffered two further set-backs in that in these cases the court held that the funds withheld by the contractor were purely and simply a tax debt due by the contractor to the Government.

In the case of *General Casualty Company of America v. United States of America,* decided by the Circuit Court of Ap-

peals for the Fifth Circuit on June 30, 1953 the District Court entered judgment in favor of appellee and against appellant for $3,129.46. The judgment was reversed by U. S. Court of Appeals. Smith, the contractor, withheld from the salaries and wages of his employees federal insurance contributions taxes in the amount of $376.98 pursuant to the provisions of Sec. 1401 (a), and income and withholding taxes in the amount of $2,182.36 under the provisions of Sec. 1622 of the Internal Revenue Code (26 U. S. C. A. 1401 (a), 1622). Thereafter the Commissioner of Internal Revenue made jeopardy assessments for the amounts of said taxes but no part of the same had yet been paid.

The Court held:

"During the period prior to the contractor's default the surety had no control of the payment of wages and could not be classed as the employer, see 26 U.S.C.A. 1621 (d). By assuming the completion of the contract and collecting the balance of the contract price including the retained percentage, the surety merely exercised its contract rights under the bond, and did not make itself liable for any default of the principal for which it was not already responsible. Any liability on the part of the surety company for taxes withheld from the employees prior to the contractor's default must rest solely on the requirements of Article 5160 of the Civil Statutes of Texas. Clearly, in our opinion, the Texas legislature intended to protect the State, its counties, subdivisions, and municipalities, and the employees and materialmen who needed such protection, and not the United States which had ample powers to protect itself."

"Further, Section 1608 of the Internal Revenue Code (26 U.S.C.A. 1608) provides as to amounts which an employer is required or permitted to deduct from the remuneration of an employee that, 'for the purposes of this subchapter the amount so deducted shall be considered to have been paid to the employee at the time of such deduction.' Though measured by amount of wages, the money due the United States was owing as taxes and not as wages. *United States Fidelity & Guaranty Co. vs. United States,* 10th Cir. 201 F. 2d. 118; *United States vs. Zschach Constr. Co.,* 110 Fed. Supp. 551; cf. *Central Bank, a Corporation vs. United States,* U.S. Supreme Court No. 521, October Term, 1952, decided June 1, 1953." 97 U.S. Lawyers Edition 872.

It will be noted, the court cited the case of *Central Bank, a Corporation vs. United States,* decided by the United States Supreme Court in June 1953.

Your editor is much impressed with the value of articles appearing in the Journal, such as the article by Mr. Sedwick, Counsel and Executive Secretary of Standard Accident Insurance Company, Detroit, Michigan. At the present time your editor has two cases pending in his office, wherein the United States Government is claiming a lien in very substantial sums against contract balances.

I trust the other United States Court of Appeals will follow the opinion of the 10th Circuit Court of Appeals in the case of *United States Fidelity & Guaranty Company v. United States,* discussed by Mr. Sedwick in his article and which, as stated by him, meets the subject squarely, and holds that the rights of the surety are superior to the rights of the United States Government.

Your editor's reference to Mr. Sedwick's article, and to cases, decided since the publication of his article, illustrates just how effectively the members can assist the editor in attempting to give the membership a worthwhile Journal. By assisting the editor in this manner, we will all receive a direct and immediate benefit.

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Sovereign Immunity of State Agencies*

GERALD B. BROPHY
New York, N. Y.

IT seems to be the popular belief that the courts of the United States have been more liberal in granting immunity from suit, to foreign governments made parties defendant without their consent, than have the courts of Europe, particularly on the continent. I am not too certain in my own mind whether there is such a clear-cut distinction between Europe and the United States on that subject. However, if the European courts have been more effective in subjecting agencies of foreign governments to liability than have the United States courts, then I am in the unusual role of an American maintaining that Europe has been right and we have been wrong during all these years.

To me the role is not a burdensome one because I feel, without reservation, that there is no justification in law or diplomacy for absolving a sovereign government from responsibility in the courts of this country or any country, for injury or damage to persons or property arising out of commercial enterprises in which the sovereign is engaged.

It is my understanding that nowhere in the world is the doctrine of immunity of a foreign government based upon a sovereign right. Immunity exists because of comity between nations and it can be granted or denied, as a matter of policy by any country, without violating any immutable principle of international law. This view was made quite clear in the opinion of Chief Justice Marshall in the Schooner Exchange Case back in 1812.[1] According to the report of this case in 7 Cranch, two stout-hearted men from the State of Maryland, by the name of M'Faddon and Greetham, owned a vessel called the Exchange when she set sail from Baltimore for Spain on October 27, 1809. While peacefully pursuing her voyage she was forcibly seized, as the story goes, by the decrees and orders of Napoleon, Emperor of France. But, two years later, according to the reporter, the vessel, "having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs."

Naturally Mr. M'Faddon, or his duly authorized representative was there to greet the vessel with a libel against her and the issue of sovereign immunity arose.

In classic language Chief Justice Marshall explained the basis of sovereign immunity in foreign courts as follows:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity

(*Address at the United Nation Headquarters before the United Nations Lawyers Group and Association of the Bar of the City of New York, May 1953.)

[1] *The Schooner Exchange v. M'Faddon,* 7 Cranch 116 (1812).

from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[3]

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers."[4]

This language and the decision in the Schooner Exchange Case which granted immunity to Napoleon have led to many decisions over the years resulting in immunity to the foreign government, including the Berizzi Case against the steamship, Pesaro.[4]

There has been considerable clarification of this subject by the Supreme Court in *Republic of Mexico v. Hoffman*.[5] This involved damage caused by the collision of a vessel owned by the Mexican government but in the possession of and operated in commercial service by a private Mexican corporation. Chief Justice Stone for the majority and Mr. Justice Frankfurter in a concurring opinion reviewed the law quite completely and laid to rest some of the results of the Schooner Exchange Case and the Berizzi Case. In the concluding paragraph of his concurring opinion, Mr. Justice Frankfurter said:

"It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when 'the department of the government charged with the conduct of our foreign relations,' or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes."[6]

So we arrive at the conclusion, it is diplomacy and politics that decide this question and not any profound principles of law.

On the political side, the present policy of the United States government is set forth in the communication from the Department of State to the Attorney General of May 19, 1952 in which it is said:

"Finally, the department feels that the widespread and increasing practice on the part of governments in engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons, it will hereafter be the department's policy to follow the restrictive theory of sovereign immunity in consideration of requests of foreign governments for a grant of sovereign immunity.

"It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations."[7]

Thus, I believe that it is now the law of this country that immunity will not be granted in our courts to state agencies of a foreign government engaged in commercial enterprises.

We have the privilege of discussing not what the law is, but what it should be. Ordinarily, I would consider myself fortunate to have been asked to write against granting immunity to state agencies engaged in commercial enterprises. The almost complete unanimity on the subject in Europe and the United States alone, would suffice to make my task relatively easy. However, with such a distinguished advocate as Mr. Michael Brandon, discuss-

[3] *Id.* at p. 136.
[4] *Ibid.*
[4] *Berizzi Bros. v. S. S. Pesaro*, 271 U. S. 562 (1926).
[5] 324 U. S. 30 (1945).
[6] Id. at pp. 41.42.
[7] State Department Bulletin, June 23, 1952; pp. 984-985.

ing the opposite view, perhaps not by conviction, but because of the necessity for some willing person to support the doctrine of sovereign immunity in order to present a complete program we may all be converted to the belief that "the King can do no wrong" even when he engages in the most ordinary forms of commercial enterprise.

In every case in which sovereign immunity is claimed, there is an aggrieved party whose person or property has allegedly been injured by the defendant. In the present day and age I find little, except expediency, to support the view that the aggrieved party should be without redress, whether the act committed by the sovereign was a public act or private act done through a commercial agency. With the emphasis that is being placed today upon the rights of the individual, it is hardly consistent to force him to bear injury or loss because of a nebulous attribute of sovereignty which developed in a day when governments did not participate in enterprises and activities heretofore classified as commercial.

We all know that until very recently, governments did not engage in business. Consequently, in a given field whether it be the operation of a transport system on land, at sea or in the air, or the production of hydro-electric power or steel or any other industry or business, any individual suffering damage or injury, whether by breach of contract or through tort, had his redress at law against the guilty party. With governments engaged in these enterprises, if immunity from suit were granted by courts throughout the world, something would be taken away from the individual which he heretofore enjoyed. In other words, by denying sovereign immunity to state agencies engaged in commercial enterprises, we are not taking from the sovereign any right or privileges previously enjoyed, but we are preserving to the individual a right which he has had before the encroachment of governments into private fields.

We have already seen in the Berizzi Case[8] that the owner of a shipment of artificial silk was unable to recover damages arising out of failure to deliver the shipment, because the steamship was owned and operated by the Italian government in a commercial service. It does seem somewhat unfair when it is realized that if the shipper had used some private carrier, the loss probably would have fallen where it properly belonged.

The plea of immunity does not arise solely in connection with issues involving vessels. Back in 1929 the United States brought a suit against several corporate defendants to enjoin alleged violations of the antitrust laws. The French Ambassador urged that one of the defendants, Societe Commerciale des Potasses d' Alsace, was controlled by the French government and that a suit against it and its officers and agents was, in fact, a suit against the French government. In connection with a motion to set aside service of process on that ground, a letter from the Secretary of State to the Attorney General was submitted, stating that it had long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no special privileges of immunity not appertaining to other foreign corporations, agencies or individuals doing business here. The motion to set aside service was denied, without prejudice to a motion to dismiss, on the ground that defendant had discontinued doing business in the United States since the suit was begun. I do not know what the final outcome was but at least on the subject under discussion it is of interest to us that the claimed immunity was not sustained. *U. S. v. Deutsches Kalisyndikat Gesellschaft,* 31 F. 2d 199 (1929).

A novel case developed in the United States Court of Appeals of the Second Circuit here in New York. This is *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen,* 43 F. 2d 705 (1930), which was also known as the Royal Administration of Swedish State Railways. The Royal Administration brought an action against Dexter & Carpenter for alleged breach of contract for the sale of the coal. The defendants, Dexter & Carpenter, filed a counter-claim seeking money damages for the purchase price of the coal. After a judgment in favor of Dexter & Carpenter on the counterclaim was affirmed by the Court of Appeals, the Swedish government asserted immunity on the ground that the Royal Administration of Swedish State Railways was not even a separate entity but was a part of the Swedish government. On that point the court held that the commencement of suit by the railway administration in the United

[8] *Berizzi Bros. v. S.S. Pesaro,* see p. 3, supra.

States courts and the voluntary appearance by the Swedish government to contest the merits of the respective claims until judgment was rendered constituted a waiver of immunity and a consent to the exercise of the court's jurisdiction. That reverts back to the days of Chief Justice Marshall and the Schooner Exchange Case which established quite definitely that the immunity of a foreign sovereign is not a right but a privilege which can be granted or taken away or waived. The point at issue in the final stages of the Swedish Railways case, however, resulted from an order of attachment and writ of execution against the National City Bank whereby Dexter & Carpenter sought to attach funds of the Swedish government on deposit with the bank. On that question the court held that the Swedish government was immune from attachment and the judgment previously rendered could not be satisfied out of the funds on deposit with the National City Bank. It has been a little difficult for me to understand why the waiver did not extend to the final process that would permit recovery on the judgment.

In the United States Court of Customs and Patent Appeals it was held that the Amtorg Trading Corporation although owned by the Soviet Union was not immune from duties imposed under the so-called Anti-dumping Act of 1921.[9] It must be said, however, that at the time of that decision the United States government had not recognized the Soviet Union and there was no diplomatic interchange between the two governments.

In the state courts there are many instances of suits against commercial agencies of foreign governments in which immunity was asserted but was denied by the courts. In New York, an action was brought by Ulen & Company[10] against The National Economic Bank of Poland to recover interest on bonds issued by the defendant bank. Not less than 60% of the shares were owned by the Polish state treasury and the balance by state enterprises, Polish municipalities and municipal enterprises. It was held that this corporation was not immune although the language of the decision indicated that if the commercial enterprise had not been carried on by a separate entity but actually as part of the state the result would have been different.

All of the harm that results from granting immunity to state agencies engaged in commercial activities does not occur solely on this side of the Atlantic. We all know that the United States government in recent years has engaged in considerable activity which may be classed as commercial in various parts of the world, giving rise, I am sure, to causes of action, both in contract and in tort, on the part of citizens of the countries in which these state agencies may operate.

There are many arguments made from time to time in favor of immunity which have nothing to do with the maxim "the King can do no wrong". It is sometimes said that the task of distinguishing between public activities of the sovereign and private activities is difficult. In some instances it may be difficult, but that is what courts and judges are for. Certainly, in this country, since the whole doctrine is based on politics and diplomacy, the view of the Department of State in a given instance would be helpful, if not persuasive. On this subject, perhaps Mr. Stavropoulos might be able to suggest a way in which the United Nations may be able to solve this particular problem.

The difficulty of satisfying a judgment awarded to a plaintiff against a state agency has been asserted as another reason for granting immunity. This difficulty certainly led to an incongruous result in the Dexter & Carpenter Case against the Swedish Railways which I referred to. This, too, is not insurmountable and might also be the subject of consideration within the United Nations if a comprehensive program for settling this question throughout the world is a possibility.

Those who believe that the difficulty of satisfying a judgment warrants liberal extension of immunity sometimes urge that immunity should be denied only to actions *in rem* which afford the basis for relief, while immunity should be granted in actions *in personam*. This seems to disregard the fact that whether *in rem* or *in personam* someone presumably has been injured and the objective should be to afford redress without being too much involved with procedures.

It has also been said that the aggrieved party may still have a remedy in the domicile of the state agency but this imposes a hardship upon the aggrieved party which

[9] *Amtorg Trading Corporation v. United States*, 71 F. 2d 524 (1934).

[10] *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N.Y.S. 2d 201 (1940).

is hardly justified. Moreover, in his own domicile the sovereign is absolute and the right to sue exists only with his consent.

Obviously, this problem has grown in importance as governments, throughout the world, have become more directly involved in enterprises heretofore considered as purely commercial. When descending to the level of business and industry and the market place, sovereigns must shed the mantle of dignity and respectability, which seems to be the sole basis of immunity, and assume their obligations to the individual with whom they deal, so that the individual carrying on commercial transactions with the sovereign will not have rights without remedies, or obligations without recourse, for failure on the part of the sovereign to perform his part of the bargain.

In this respect the sovereign should be no different from the dignitary who, many years ago, having breached his agreement was charged under the law merchant by those aggrieved. His defense was that he was a gentleman and the law merchant applied only to merchants and traders; but the decision was that a gentleman is no gentleman when he descends into the market place and does not live up to his commitments. I believe the same is true of sovereigns when they become businessmen as well.

Report of Accident and Health Insurance Committee

DURING 1953 the legislatures of all the states, except Kentucky, Louisiana, Mississippi and Virginia, were in session. As a consequence, there were many new laws and statutory amendments affecting the accident and health field which should be of interest to all Association members.

Last year's report of the Accident and Health Committee listed the states which had enacted the new "Uniform Individual Accident and Sickness Policy Provisions Law." This year the Uniform Law was introduced in seventeen states and the District of Columbia, and at the date of this report it has been passed by eleven states—Florida, Idaho, Indiana, Maine, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Vermont and Wyoming, making a total of twenty-eight states which have enacted the Bill into law; (however, North and South Dakota will not permit its use until July 1, 1953, Florida until October 1, 1953, and Maine and North Carolina until January 1, 1954) with the ten other states which permit use of the Uniform Policy on an optional basis, a total of thirty-eight states is reached, which to your Committee seems very commendable. In order to keep the industry informed, your Committee submits a list (see Appendix A) showing the states and jurisdictions where the Uniform Policy is permitted and those where the Standard Policy form is still required, the date after which only new Uniform Policies may be filed, and the date after which all policies issued must be uniform.

The trend to reduce the required number in a group for disability insurance continued this year. Three states — Illinois, West Virginia and Utah—reduced the minimum participation for the single employer-employee group from 25 to 10, while North Carolina removed the 25 employee requirement entirely thus reducing the minimum to more than one employee. Indiana, which heretofore specified no minimum number for participation, enacted a group law authorizing the insuring of a group of not less than 10 employees. Vermont, on the other hand, reduced the required group from 10 to 5.

Also, many states expanded their laws to authorize various governmental bodies, including state, county and municipal, to make employee wage deductions to cover a portion or all of the group premium.

In the field of blanket accident and health, activity was limited this year with only two states, Illinois and New Mexico, passing a blanket Bill. The New Mexico Bill, however, does not provide for insuring of the debtors of a creditor. Also, both California and Florida broadened their blanket law during the 1953 legislative session.

Only one state, Indiana, enacted the model Bill for franchise insurance, while in Iowa a bill has been passed authorizing the issuance of franchise policies to associations only.

In the field of countersignature and commission requirements there was one notable change and that was in West Virginia. Apparently taking the nod from its sister state Virginia, West Virginia enacted a law requiring that the entire commission on a policy of insurance, except life, be paid directly to the resident agent countersigning the policy as required by law or otherwise, who may pay only a specified portion of this commission to a licensed non-resident broker. This type of a law has been found to be difficult in application and has increased many fold the problems of underwriting. The Commissioner of West Virginia, in a ruling subsequent to the passage of this law, has said that it was clear that commissions may be paid only to licensed resident agents, but that payment of the allowed legal portion of the commission to licensed non-resident brokers by companies *at the direction of countersigning agents* shall be regarded as payment to the countersigning agent. This type of legislation seems to be on the increase. A countersignature Bill in Tennessee, which was defeated, would have required that all accident and health contracts (or individual certificates) issued through a non-resident agent or broker covering employees of a Tennessee unit of the group be countersigned by a Tennessee resident agent. This Tennessee agent was required to receive at least 50 per cent of all commissions paid because of the inclusion of the Tennesese unit.

Probably the most dangerous legislation of the year was that introduced in North Carolina (House Bill Number 344) which, after much effort, was finally killed. This Bill would have made all policies of accident and health insurance, for all practical purposes, non-cancellable. It provided that after a policy had been in force for

one year, cancellation could only be effected by giving the insureds notice equal to one-half of the policy in force period. In other words, if a policy had been in force for four years, the notice of cancellation required would be two years.

A great volume of legislation introduced this year concerned medical payments under an automobile liability policy. This legislation, in effect, allows companies to write accident and health insurance outside of the accident and health law. In all, this type of legislation was introduced in seventeen states and was placed in the statute books of Maryland, New Mexico, North Carolina, Oregon, Vermont and Washington. The majority of these Bills provide for medical payments for all those injured, whether a passenger in the insured's car or not, regardless of the liability incidence.

Legislation requiring insurance companies to pay attorney's fees, and in many cases a penalty after an unsuccessful trial of a claim under the policy or a "vexatious" refusal to pay the loss, was on the increase, being introduced in some seven states. Arkansas broadened their law to add "hospital, medical and surgical" to the list of companies presently required to pay claims within the time specified in the policy under a penalty of 12 per cent plus attorney's fees.

An interesting problem in the State Insurance Department field has arisen over the use of the suicide clause in accident and health policies in New York and Maryland. The standard suicide exclusion used in many policies reads: "Suicide or self destruction, or any attempt thereat, while sane or insane." The New York Department has taken the position that the words "self destruction" be qualified by the word "intentional" and this year this same idea has found its way into the thinking of the Maryland Department. Since the term "suicide" means the intentional taking of one's own life, the two terms "suicide" and "intentional self destruction" are synonymous. As an insane person does not commit suicide but commits self destruction, the use of the whole phrase which New York and Maryland will approve, "suicide or intentional self destruction while sane or insane," means nothing more than "suicide."

In the field of litigation there are a number of scattered cases which are worthy of note.

A case which aroused some interest this year was *Moore v. Palmetto State Life Insurane Ccompany* (decided December 11, 1952) 73 SE 2d 688. The South Carolina Supreme Court held the insurer liable on the theory of an implied acceptance of the application. The continued retention of the premium deposit for a long period of time and a statement by the agent two or three weeks prior to the death of the plaintiff's husband that he would inform her "within a few days" whether the application was acceptable was held to be more than a mere delay to give rejection notice within a reasonable time. The court stated that plaintiff could maintain her action either in tort or in contract.

Reformation for mutual mistake was allowed by the Iowa Supreme Court in *Quinn v. Mutual Benefit Health and Accident Association of Omaha* (55 NW 2d 546). The insured had specifically stated the type of policy she wanted and was assured by the agent that she was receiving it. Insured was granted reformation even though admitting she had failed to read the contract where it was later found that the policy contained a female exclusion clause.

Washington Supreme Court denied recovery in *Rew v. Beneficial Standard Life Insurance Co.* (250 P 2d 956) for expenses incurred while in a rest home since the insured was not in a "hospital" as that word was used in the policy.

On the point of an employer being the agent of the insured employee or of the insurer under a group policy, your attention is called to the New Jersey case of *Keane v. Aetna Life Insurance Company of Hartford* (91 ATL 2d 875) and to *Hanaeiff v. Equitable Life Assurance Society of U. S.* (92 ATL 2d 202) decided by the Pennsylvania Supreme Court.

This year brought increased activity in the field of accident and health legislation and litigation; also the number of people insured under private plans has increased considerably. Probably both these trends will continue in the future.

Respectfully submitted
JOHN A. HENRY, *Chairman*
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Appendix A

State	Uniform Policy Permitted Now	Date After Which Only New Uniform Policies May Be Filed	Date After Which All Policies Issued Must Be Uniform	Standard Form Still Required
Alabama	X			(1)
Arizona				X (2)
Arkansas	X	January 1, 1955	January 1, 1955	
California	X	January 1, 1957	January 1, 1957	
Colorado	X	January 1, 1952	January 1, 1952	•
Connecticut	X	January 1, 1952	January 1, 1957	
Delaware	X			
Florida		October 1, 1956	October 1, 1956	X (until 10-1-53) (3) (5) •
Georgia				X
Idaho	X	January 1, 1957	January 1, 1957	(3)
Illinois	X	January 1, 1955	January 1, 1957	
Indiana	X	January 1, 1956	January 1, 1956	(3)
Iowa	X	July 4, 1951	July 4, 1956	
Kansas	X	After first filing	June 30, 1956	
Kentucky				X
Louisiana	X			
Maine		January 1, 1957	January 1, 1957	X (until 1-1-54) (3)
Maryland	X	June 1, 1951	June 1, 1956	
Massachusetts				X
Michigan	X	January 1, 1956	January 1, 1956	•
Minnesota				X (2)
Mississippi	X			
Missouri				X (2)
Montana	X			
Nebraska	X	January 1, 1956	January 1, 1956	
Nevada	X	July 1, 1956	July 1, 1956	(3)
New Hampshire	X	July 1, 1956	July 1, 1956	
New Jersey	X	1st election or January 1, 1957	1st election or January 1, 1957	
New Mexico	X	July 1, 1953	July 1, 1953	(3) (4)•
New York	X	After first filing	July 1, 1956	
North Carolina		January 1, 1957	January 1, 1957	X (until 1-1-54) (3)
North Dakota		July 1, 1956	July 1, 1956	X (until 7-1-53) (3)
Ohio				X (1)
Oklahoma				X
Oregon	X			
Pennsylvania	X			
Rhode Island	X	January 1, 1952	January 1, 1957	
South Carolina				X
South Dakota		January 1, 1957	January 1, 1957	X (until 7-1-53) (3)
Tennessee	X			
Texas	X			
Utah	X			
Vermont	X			
Virginia	X	June 1, 1956	June 1, 1956	(3)
Washington	X	July 1, 1956	July 1, 1956	
West Virginia		September 1, 1956	September 1, 1956	
Wisconsin	X			X (2)
Wyoming	X	January 1, 1957	January 1, 1957	
Other Jurisdictions:		January 1, 1957	January 1, 1957	(3)
Dist. of Columbia				X (1)
Alaska	X	September 1, 1956	September 1, 1956	
Hawaii	X	January 1, 1957	January 1, 1957	
Panama	X			
Puerto Rico	X			

(1) Uniform Bill under consideration at date of this report.
(2) Uniform Bill defeated this year.
(3) Uniform Bill enacted this year.
(4) New Mexico will accept a rider conforming Standard Provision Policies to Uniform.
(5) After October 1, 1953, policies meeting old requirements may be used provided a suitable endorsement is given indicating compliance with key provisions of the new law. It is even indicated the new uniform policy may be permissible at the present time.

• The "Time Limit on Certain Defenses" clause in the Uniform Law in these four states—Colorado, Florida, New Mexico and Michigan—was changed from three to two years. However, the Departments of Michigan and Florida will allow a policy to read three years so long as a company promises to treat the clause as only two years.
It should also be noted that the New Mexico law allows cancellation only at the end of the term for which the premium has been paid.

Report of Automobile Insurance Law Committee

THE Committee undertook to make a survey of pre-trial hearing procedures in an effort to obtain information from active trial lawyers throughout the country that might be of value to lawyers and judges wherever this procedure is being studied for possible adoption or improvement. Within the last year or two several more states have enacted legislation or their courts have adopted rules to permit pre-trial hearings and the lawyers and courts in these and other states are seeking ways of making pre-trial hearings effective. In California, Connecticut and Rhode Island and elsewhere studies as to the advisability of adoption of pre-trial procedure are under way. Most studies heretofore made have emphasized the viewpoint of the judiciary or have been rather local in scope. Our survey is national in scope and expresses the viewpoint of the lawyer in active practice devoting a substantial amount of his time to tort and insurance litigation.

Extent of Survey

The Committee sent out 629 questionnaires and received 424 returns. We consider this (67%) a rather high percentage of returns that is probably attributable to timely nature of the topic and to the work of the Committee members who sent questionnaires in designated areas with personal notes of transmittal. Another noteworthy circumstance is that, although the questionnaire was rather lengthy, about 50% of the lawyers who responded also wrote informative letters or memoranda expressing their views concerning various aspects of this problem.

A copy of the questionnaire showing the tabulation of responses to the various questions is annexed and will be of interest to anyone studying this problem.

Weight to be Accorded the Survey

We think the views of the members of this Association are valuable. As a requirement of membership in this Association one must have been in active practice for at least five years, a substantial part of which must have been devoted to the representation of insurance companies. We know that the majority of the members have had much longer and more concentrated experience than that in the active handling of litigation. Although home office counsel of insurance companies are also members of the Association, we did not send questionnaires to them, nor did we send more than one member or associate of any law firm a questionnaire, our aim being to obtain the views of the lawyers in private practice who are actively handling litigation daily.

To obtain a proper spread of views we distributed our questionnaires in large and small cities and rural communities. They were sent to all states in the same ratio as the state membership bears to total membership in the Association, subject to revision where the state membership seemed to be unusually heavy or light. This selection followed closely the ratio of lawyers to state population as shown in the American Bar Association Journal, February 1953, page 115.

The Range of Viewpoints

The range of views of those who responded as to the merits of pre-trial and the manner in which such hearings should be conducted is astounding. Examples are:

Pro

"We feel that such procedure saves time and expense of the actual trial and has great value in negotiating realistic settlements."

"Lawyers who have found it beneficial in the Federal Courts are insisting upon it in state courts. . . ."

"Pre-trial has been very successful. . . . I have found it very helpful in my practice. . . . I have been able to settle many bad claims . . . in pre-trial court."

"We are very fortunate in having a federal judge in this district who makes *full* use of the pre-trial conferences in all cases, greatly expediting matters."

Con

"The entire system is an outrage to trial lawyers."

"Our pre-trial is nothing more than pressure to secure settlements. As a pre-

trial to save time of trial the proceeding is a joke."

"The facts that may be stipulated can be stipulated in five minutes before trial starts. Pre-trial hearings merely take up a lot of time and accomplish nothing. Parties are entitled to a trial and should not be compelled to go through a semi-trial."

"We should stop these so-called pre-trial conferences where they are used solely as a means of 'sandbagging' litigants into settlement."

Between these extremes, however, is a body of objective thought as to the advantages of pre-trial hearings and how they should be conducted to make them most effective. Even the most confirmed opponent of pre-trial after stating his objections is inclined to see some good in it, as for example, one who stated five objections and then concluded:

"While I believe much of my objection to time-wasting, ineffectual pre-trial could be overcome by a judge who is endowed with the proper balance in his personality, which for lack of a better word, I think of as dynamics, and who thus has the ability to make pre-trial effective if it can be promptly followed by a trial upon the merits, nevertheless, I do not believe the Lord endows the average judge with enough of these qualifications to overcome the basic ineffectiveness inherent at the occasion of pre-trial."

Types of Pre-Trial

Some courts, particularly in large cities, use the pre-trial device solely as a means of settling cases. In other courts the pre-trial hearing is essentially a routine to clear deadwood, such as cases in which the parties are not ready for trial, cases about to be settled and the like, from the trial calendar in order to stabilize the daily calendar, thus avoiding having periods when the trial judges have no cases to be tried and trial lawyers are needlessly kept waiting for their cases to be reached.

Some follow the traditional pre-trial procedure of narrowing issues, disposing of law points, obtaining concessions, marking exhibits, limiting number of witnesses and the like, and follow this by participating in a discussion of settlement, while other judges show less interest in settlement and merely ask whether it can be arranged and let the lawyers discuss settlement without participation by the court.

The Value of Pre-Trial

The traditional pre-trial hearing including complete discussion of settlement with the judge participating in such discussion, compels adequate preparation for the hearing by counsel. It causes a crystallization of his thinking about his case and provides an atmosphere of conciliation prior to reaching the courthouse steps a few minutes before trial where so many cases are finally settled. While the replies to the number of cases settled at pre-trial vary considerably, perhaps because some only credited those completely settled at such hearings and others included cases settled shortly after the hearing, there is no doubt that a properly conducted pre-trial hearing, with the idea of settlement only a by-product and not a primary aim, produces a high percentage of settlements short of actual trial. An overwhelming majority favor pre-trial hearings in automobile tort cases. A lesser majority believe that such hearings actually reduce the time spent on the trial of automobile tort cases. The majority also believe that trial calendars are expedited by pre-trial hearings in all types of cases.

The Judge

The most significant fact developed by this survey is the constantly recurring opinion that the judge is the key to the success or failure of a pre-trial hearing. The judge who is most successful in disposing of litigation at pre-trial and reducing the time spent at the trial if one is necessary, must be enthusiastic about the value of pre-trial. He must insist upon attorneys being prepared. He should carefully follow an established procedure designed to narrow issues, simplify introduction of evidence, dispose of or at least prepare for law issues, ascertain the number of witnesses expected and what the nature of their testimony will be and he should induce settlement discussion and offer his advice about settlement, while not coercing or applying pressure to the parties to make a settlement. Preferably, the judge should be one of the more experienced members of the court with an aptitude for mediation.

This seems to have been demonstrated in state and federal courts by comparison

of results achieved in the pre-trial of cases in the same court before different judges. An indifferent attitude on the part of the judge is imparted to the lawyers and the pre-trial proceedings degenerate into a perfunctory, time-wasting ineffectual routine. The power to invoke sanctions for lack of cooperation by attorneys undoubtedly would prompt cooperation by the Bar, but, in the final analysis, the enthusiasm, prestige and ability of the judge seem to be the dominating factors.

Discussion of Settlement

As indicated above, the pre-trial hearing should be directed at narrowing issues, resolving law questions, obtaining concessions, identifying and admitting exhibits and the like, but in addition thereto discussion of settlement with the court ought to be an essential part of the hearing. The hearing provides an atmosphere for conciliation close to trial. It occurs at a time when the attorney's thoughts have been crystallized and when opportunity is afforded him to discuss this delicate subject without fear of showing signs of weakness or lack of confidence in his case.

It would seem to be essential to make pre-trial hearings completely effective in tort cases that an expression of settlement value by the court and an attempt to conciliate differences between counsel as to the case's value, but without coercion or pressure being exerted by the court upon the attorneys is necessary. Settlement should continue to be a by-product rather than the primary aim of the pre-trial hearing. This type of settlement discussion is not to be confused with the current practice in some metropolitan areas where the sole aim is to settle cases and the judge makes no attempt to narrow issues, obtain concessions or follow the traditional pattern of pre-trial procedure.

Pre-Trial Discovery Procedure

Liberal pre-trial discovery procedure, particularly the oral interrogation of opposing parties rather than by written interrogatories, is essential to the effectiveness of pre-trial hearings. Neither the parties nor the court can deal fairly with the essential issues of fact and law and evaluate the case for settlement purposes unless there has been an opportunity to determine the essential facts of both the plaintiffs and defendants through pre-trial discovery.

Time of Holding Pre-Trial

The most favorable time for conducting a pre-trial hearing seems to be about two to four weeks before the actual trial will be held. By then the essential preparatory and pre-trial discovery work has been done and the attorney is thoroughly familiar with his case. The imminence of trial compels formulation of a plan of handling the lawsuit which is the state of mind prerequisite to a successful pre-trial hearing. If the trial is not likely to be held for several months or more after the pre-trial hearing, the element of compulsion by necessity for decisive action on the part of counsel is lacking and he tends to devote his energies to more urgent problems.

Formality of Hearings

The majority of judges apparently hold pre-trial hearings in chambers rather than in the courtroom. The formality of the courtroom undoubtedly compels better preparation and stricter application to the matter at hand than the informality and flexibility usually attendant upon hearings in chambers. The degree of success of the hearings, however, seems to be more dependent upon the personality, dignity and forcefulness of the judge, than upon the room in which the hearing is held. Counsel should not be subjected to such burdensome procedures as preparation of a written memorandum of facts, issues, possible concessions. The pre-trial order, which really is a judicial determination arrived at by agreement, ought to be dictated by the judge to the reporter in the presence of counsel and signed or otherwise signified as correct and acceptable by counsel.

Pre-Trial Hearings and Calendar Delay

There is no doubt that properly conducted pre-trial hearings where something is accomplished, are a substantial factor in expediting the movement of trial calendars. In areas where court calendars are current, because of the limited demand upon the court, the pre-trial hearing procedure, even though provided for by statute or court rule, is little used. In New Jersey, on the other hand, where pre-trial hearings undoubtedly played a great part in eliminating calendar delays and bringing the trial calendars up to date, the mechanics of pre-trial are still being perfected by the courts and hearings are conducted in every case.

Recommendations

The Committee recommends that the Open Forum Committee consider having this subject on the agenda at next year's meeting of the Association, perhaps by a panel discussion. Responses to our survey demonstrate a wide and lively interest in the subject, and it seems to us that such a forum would afford an opportunity to our members to hear the views of others practicing in the same field of law who have had wider experience with pre-trial hearings.

* * *

The Committee wishes to express its appreciation to the membership for their interest and cooperation in this undertaking.

Respectfully submitted,
JAMES P. ALLEN, *Chairman*
FRANCIS VAN ORMAN, *Vice Chairman*
JAMES W. ARCHER
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FRED M. MOCK
WILLIAM F. MCNAMARA
W. H. SADLER, JR.
P. L. THORNBURY
ROYCE G. ROWE, *Ex-Officio*

* * *

QUESTIONNAIRE

1. In what city and state do you have your office?
   City ..... State .....
2. Do you have pre-trial discovery procedure in your upper state courts which permits:
   (a) full inquiry as to all relevant facts by either party of the other by written interrogatory or oral examination
   Yes 288; No 102.
   (b) similar complete interrogation of witnesses who are not parties
   Yes 211; No 169.
3. Does your upper state court conduct pre-trial hearings in tort actions?
   Yes 291; No 106.
   (a) Is the judge obliged by rule or statute to conduct such a pre-trial hearing or is it optional with the presiding judge to hold one?
   Compelled by rule 86.
   Compelled by statute 18.
   Optional with judge 240.
   (b) Are such hearings held in all such actions regularly or only in some such actions occasionally as might suit the judge's convenience or inclination?
   Regularly in all tort actions 132.
   Occasionally as judge sees fit 183.
   (c) Are such hearings conducted in the courtroom or judge's chambers?
   Courtroom 103.
   Judge's Chambers 251.
   (d) Is plaintiff or defendant or both to be present?
   Plaintiff 1.
   Defendant 0.
   Both parties 96.
   (e) Are they conducted in formal or informal manner?
   Formal 40.
   Informal 289.
   (f) Must each of the parties make a statement of evidentiary facts to the court as to the manner of the happening of the accident, damages, etc., or will the mere general statement suffice?
   Evidentiary facts 41.
   Mere general statement 273.
   (g) Does the judge enter a pre-trial order following the hearing?
   Yes 207; No 108.
   (h) Is the order dictated to the court stenographer by the judge?
   Yes 168; No 119.
   (i) Do the attorneys have to sign a consent to the entry of the order or otherwise indicate in writing their agreement with its contents?
   Yes 81; No 224.
   (j) Must the attorneys remain in attendance until the pre-trial order or minutes are typed by the court stenographer?
   Yes 34; No 258.
4. Is the settlement of tort cases in the pre-trial a mere by-product of the procedure or the primary aim of the court?
   By product 235.
   Primary aim 78.
   (a) Are settlement negotiations conducted between the attorneys for

the parties at such hearings?
Yes 219; No 124.

(b) If "yes" does the judge participate in such negotiations?
Yes 149; No 131.

(c) If the judge does participate, does he wait until parties ask him to assist in settlement negotiations?
Yes 102; No 112.

(d) Does the judge comment on or evaluate the worth or merit of the case to persuade the parties to settle?
Yes 132; No 191.

5. Is any distinction made between automobile tort cases and other tort cases with respect to the following:

(a) The formality of the hearing.
Yes 1; No 312.

(b) The attempt to secure agreement as to facts of the happening of the accident.
Yes 27; No 328.

(c) Participation of the court in discussion of settlement.
Yes 20; No 291.

(d) The degree of persuasion, if any, direct or indirect attempted by the court to bring about settlement.
Yes 12; No 233.

6. Is the attorney who will try the case required to appear at the pre-trial hearing? If not, must a lawyer represent him, or may he send a clerk, stenographer or adjuster?
Trial Counsel 124.
Any Lawyer 233.
Clerk or Stenographer 7.
Adjuster 8.

7. (a) How much time is spent by the court in conducting a pre-trial hearing in the average automobile case?

Range 10/120 5 minutes 3.
10 minutes 21.
15 minutes 33.
20 minutes 49.
25 minutes 1.
30 minutes 112.
35 minutes 1.
45 minutes 12.
60 minutes 39.
90 minutes 3.
120 minutes 1.

(b) In the average tort case other than an automobile accident case, does the court spend more or less or about the same time in a pre-trial hearing than you indicated in the preceding answer?
More 22; Less 8; About same 251.

8. In what percentage of your automobile cases in which pre-trial hearings are conducted are settlements agreed upon at the pre-trial hearings?
Percentage (see below*)

9. In your opinion, does the pre-trial hearing appreciably speed up the actual trial of the average automobile accident case?
Yes 180; No 149.

10. Are you in favor of pre-trial hearings in automobile accident cases?
Yes 260; No 68; Undecided 42.

11. Do you believe that pre-trial hearings are a substantial factor in expediting the movement of your trial calendars?

(a) In automobile accident cases:
Yes 204; No 130.

(b) In other tort cases:
Yes 205; No 121.

(c) In contract and other cases:
Yes 209; No 11.

12. How long does it take a tort action to reach trial in your city?

(a) In the federal district court:

Jury	Non-Jury
Months	Months
1-42	1-42

(b) In the upper state courts:

Jury	Non-Jury
Months	Months
1-48	1-30

13. If pre-trial hearings are held in your federal district court in automobile tort cases, are such hearings any more effective than those in your state courts, and to what do you attribute this?
Yes 166; No 121.

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*Atty's rept'd 5% or less 82
6%-20% 56
21%-40% 25
41%-60% 34
60% or more 11

Report of Committee on Aviation Law

THE Committee has studied three main subjects during the present year. We believe them to be of vital interest to aviation as that industry is related to insurance; they are:

1. State statutes providing for substitute service of process.

2. The adoption of statutes limiting the recovery of guest passengers.

3. The attempt of the Civil Aeronautics Board to provide compulsory insurance by regulation.

In the study of these subjects the Committee, as usual, has had the invaluable aid of George W. Orr. The Committee has been divided into study groups. On the issue of substituted service the committeemen were Samuel O. Carson, Charles F. Fish, William H. Fletcher, Jr., and E. Smythe Gambrell. For the study concerning guest statutes, the members were William W. Davis, Madison B. Graves, John M. Ulman and Wray G. Zelt, Jr. The study of federal interference with insurance regulation was made by Robert P. Hobson, Wilson C. Jainsen, G. L. Reeves and Philip J. Schneider.

In addition to these subjects, it was originally suggested by Mr. Orr that we make some comment concerning the forces which then seemed to be gathering their power in an attempt to foist a new version of comparative negligence upon the existing tort laws. It was at first believed that this subject was not properly one for comment by this Committee. However, in view of the developments during the year, the Committee has added, as a part of its concluding report, its comments concerning this problem, since it is apparent that comparative negligence could affect aviation law as well as any other of our established negligence laws.

Substituted Service Statutes

Several states have enacted laws seeking to permit the acquisition by the state court of jurisdiction over the person of a nonresident aircraft operator by substituted service of process on a state official in an action growing out of an accident or collision of an aircraft. Among such states are Illinois,[1] Minnesota,[2] New Jersey,[3] and New York.[4]

Each state, except New York, provides for the service of process on a designated state official in actions growing out of accident or collision within the state. The New York Statute, passed in 1952, apparently attempted to provide for service of process in New York in actions growing out of an accident or collision of an aircraft outside as well as inside the state, merely because the aircraft had landed in or departed from a New York air field. For this reason, the New York Statute appears to be unconstitutional.

In a New York action, Margaret Peters, as administratrix, sued Robin Airlines, a California corporation, to recover damages for personal injuries to and wrongful death of plaintiff's intestate, both of which arose out of an accident to an aircraft owned by Robin Airlines. The accident occurred in California. The aircraft, with plaintiff's intestate aboard, took off from New York's LaGuardia Airport but touched down in several states before it crashed in California. Jurisdiction was purportedly obtained over Robin Airlines by serving the Secretary of State under the provisions of Chapter 250 of the General Business Laws. Robin Airlines appeared specially to attack such service of process. The lower court held the service good and the statute therefore constitutional. On appeal, the Supreme Court unanimously held that in so far as the statute purported to give New York jurisdiction by substituted service over an accident in which an aircraft is involved, regardless of the *locus* of the accident, to that extent the statute was unconstitutional.[5]

[1] *Illinois Laws of 1951*, House Bill No. 653.

[2] *Minnesota Statutes 1949*, Secs. 360.0215.

[3] *New Jersey Laws 1952*, Chapter 199.

[4] *New York General Business Law*, Sec. 250, added by Chapter 748, New York Laws 1952.

[5] The Court's decision is reported in 3 Aviation cases, 18,148. It was decided on or about March 23, 1953, and is quoted here in full because it is short and as yet unreported elsewhere.

"Peters, as adm'x, of *Stuart Barnes, dec'd, res, v. Robin Airlines, ap*—In an action to recover damages for personal injuries sustained by plaintiff's intestate and for his wrongful death, defendant, appearing specially, appeals from an order denying its motion to set aside

In so far as the reported cases show, the *Robin Airlines case* seems to be of first impression. Within a day or two after the case was decided, on March 24, 1953, the New York Legislature amended the statute in question[6] so as to include only accidents in which the aircraft was involved while operating in the State of New York. The amendment makes moot for future accidents occurring outside the State of New York the question of whether or not that state's Substituted Service Statute is constitutional.

Although few states have passed statutes providing for substituted service on non-resident owners of aircraft, most jurisdictions have Substituted Service Statutes providing for service of process of foreign owners of motor vehicles or automobiles. Such statutes, where they apply to the operation of motor vehicles within the state boundaries, have uniformly been upheld as a valid exercise of the state's police power.[6a] Of some interest is the question of whether or not these statutes may be used to serve a non-resident owner of aircraft in actions arising out of an accident or collision of the aircraft within the state. This has been successfully done in Florida.

In Miami, Florida, Reese sued Hicks-Kesler, a non-resident corporation, for her husband's wrongful death in an aircraft accident occurring at a private airport in Florida. She served the Secretary of State under the provisions of the Florida Substituted Service Statute dealing with Motor Vehicles.[7] The statute makes no reference to aircraft. Hicks-Kesler filed a special appearance challenging the Court's jurisdiction. It also removed the case to Federal Court.

Five days after removal, Hicks-Kesler, as required by the Federal Rules, filed its answer and all its defenses at the same time, including the challenge to the Court's jurisdiction. Later, plaintiff had the cause remanded. In the State Court, the question of substituted service was fully argued. Without opinion, the Court held the substituted service good and valid as to the owners of the aircraft, and ordered Hicks-Kesler to answer and proceed to trial.[8]

Hicks-Kesler sought a writ from the Florida Supreme Court to prohibit the lower court from assuming jurisdiction. The Florida Supreme Court denied the writ.[9]

Hicks-Kesler sought certiorari from the Supreme Court of the United States, which was denied.

The decision of the United States Courts, with reference to Florida Law, may not necessarily be followed by the State Courts, if and when the issue is presented to them. However, the decision should be highly persuasive, for it appears to be well founded in logic. The Florida statute deals with motor vehicles. It is an exercise of the state's police power in dealing with dangerous instrumentalities, even though it was enacted to deal with automobiles. In that state, apparently, an aircraft is a motor vehicle, and may be a dangerous instrumentality, and although a new form

the service of the summons and complaint and to dismiss the complaint, on the ground of lack of jurisdiction. Order reversed, with $10 costs and disbursements, and motion granted, with $10 costs. Defendant is a California corporation and is a common carrier of passengers by air. One of its airplanes carried the decedent as a paying passenger from an airfield in this state on a flight destined for California and the airplane crashed in California before landing there, which accident resulted in the causes for which this action was attempted to be brought. The summons was served on the secretary of state as 'attorney' for defendant, in pursuance of section 250 of the General Business Law (L. 1952. ch 748) The statute purports to give this state jurisdiction, upon said substituted service, in any action against a nonresident operator or owner of aircraft, growing out of an accident, or collision in which the aircraft is involved, regardless of the locus of the accident or collision, so long as the aircraft 'has landed at, or departed from any airfield in this state.' The staute is unconstitutional in so far as it is applicable to accidents or collisions which did not occur within or over the territorial limits of this state or which had no causative connection to acts within or over said limits. To that extent it violates the due process clause (U.S. Const., 14th Amendt., sec. 1; N. Y. Const., Art I, sec. 6). Constitutionality of statutes similarly providing for substituted service on nonresidents in cases involving motor vehicle accidents has been upheld under the doctrine of police power (*Hess v. Pawloski*, 274 U. S., 352; *Wuchter v. Pizzutti* 276 U. S. 13; *Shushereba v. Ames*. 255 N. Y. 490; Leighton *v. Roper*, 300 N. Y. 434). However, the police power of a state may not be projected beyond the territorial boundaries of the state (see *Peirce v. New Hampshire*, 46 U. S. 554), and the statute in question does not purport to condition the jurisdiction on causative connection of the accident to any acts within this State (cf. *Finn v. Schreiber*, 35 F., Supp., 638)."

[6] Chapter 148, Laws. 1953.

[6a] *Hess v. Pawloski*, 274 U. S. 352.

[7] Sec. 47.29 and Sec. 47.30 FS 1951.

[8] *Reese v. Hicks-Kesler Flying School, Inc., et al*, 11th Judicial Circuit, Dade County, Florida.

[9] Unreported memorandum decision.

of transportation, may be even more dangerous on rare but outstanding occasions than other types of such vehicles.

It is undoubtedly true that the state's police power extends to its territorial limits. It would seem to be logical to conclude that in so far as other states may pass statutes similar to the New York law as now amended, the service therefor provided will be good, and will be sustained so as to require appearance in the state or federal court in which the accident occurred.

There appears no purpose in restating the general law with reference to substituted service for it has been excellently covered by past treatises by members of this association. However, since the case of *Peters v. Robins Air Lines* arose in New York, it may be well to note the cases which differentiate between those accidents occurring within the state of New York and those which occur outside the state. Upholding the right of the state to provide for substituted service for those accidents which occur within its boundaries are:

Hess v. Pawloski, 274 U. S. 352.
Leighton v. Roper, 300 N. Y. 434.
Sweet v. Miller, 147 Misc. 807; 264 N. Y. Supp. 565.
Finn v. Schreiber, 35 Fed. Supp. 638.

For cases which hold that the act is unconstitutional, in so far as it attempts to provide for substitute service on non-residents for actions arising outside of the State of New York, see:

Sweet v. Miller, 147 Misc. 807; 264 N. Y. Supp. 565.
Baldwin v. Powell, 294 N. Y. 130.
Siso v. Kleimer, 135 Misc. 154.
Farron v. Eastern Air Lines, 193 Misc. 395.

Conclusion on Substitute Service

The public announcement was made subsequent to the decision in the Appellate Division of New York that appeal would be made to the Civil Court of Appeals, which is the highest court of review in that state. It is the opinion of the Committee that the logic of the decision rendered by the Appellate Division will be followed in any event. Likewise, it is our conclusion that other states will follow the same rule because it is the logical and fair one. It seems patently unfair that merely because an airplane should take off from LaGuardia Field in New York, that fact should give the courts of New York jurisdiction over an accident occurring subsequently in any one of the other 47 states than New York. However, since the smaller carriers may not be admitted to do business in some of the states over which they fly, it is possible that the legal minds will continue to attempt legislative enactment providing for some type of service which will eliminate the necessity of suing the carrier only in those states where, either the accident occurs, or the airline carrier is domiciled. As those statutes may make their appearance, further study will be necessary to determine their logic and fairness. There does not seem presently to be a basis upon which they can be held to be constitutional.

The Guest Law As Applicable To Automobiles Is Not As Widely Adopted As Might Seem At First Blush

It appears that only about two-thirds of the states have effective guest laws applicable to motor vehicles. To those of us who practice in the states where these laws are effective, they seem to be almost a necessity in order to avoid collusive action. That there may be a concerted effort on the part of the guest and the host to permit the host to recover in aviation accidents, provided both survive, is a demonstrable fact from the files of aviation insurance carriers. It is to be expected that guest statutes will be passed in more and more states as the litigation arising from private plane operation increases, and as the premium load which must be borne by the average airplane owner increases because of unfounded but successful claims by guests.

We are advised that there is in fact a draft proposal now being considered by the National Conference of Commissioners on Uniform State Laws which, if approved and promulgated by the States under the sponsorship of the State Commissioners, will accelerate the rate of passage. This proposal is as follows:

"An Act to provide for the status of a person riding in an aircraft as a guest without payment of compensation with respect to liability on the part of the pilot, owner or owner's employee or agent, for injury to, death of, or loss incurred by such person in or as a result of an accident while so riding;

"No person riding in an aircraft as a guest, without payment for the ride

or transportation, nor his personal representative, in the event of the death of such guest, shall have a cause of action against any pilot or crewman of such aircraft, or its owner or his employee or agent, for injury, death or loss in case of accident, unless the accident was caused by the wilful and wanton misconduct of the pilot or crewman of such aircraft or its owner or his employee or agent, and unless such wilful and wanton misconduct proximately resulted in the injury, death or loss for which the action is brought."

At present there are guest laws in the following states: California, Delaware, Illinois, Indiana, Oregon, South Carolina, South Dakota, Wisconsin and Georgia.

California	Chap. 653 (1949)
Delaware	S. B. 61 (1949) amend. Art. 8, Chap. 165 of Code.
Illinois	S. 231 (1949)
Indiana	Chap. 192 (1951)
Oregon	Chap. 195 (1949)
South Carolina	Code Sec. 5908
South Dakota	Chap. 6 (1949)
Wisconsin	Chap. 269 (1951)
Georgia	Code Sec. 11-107

A very interesting situation arose under the Georgia statute. Special legislation is necessary as the motor vehicle laws have, except perhaps in Florida, been generally interpreted as not applicable to aviation. However, the Georgia Court of Appeals, in a decision in June, 1952, has applied the law applicable to guests in automobiles to the aviation statute—not as a statute, but as the established law, *Sammons v. Webb,* 3 Avi. 18, 034.

Georgia Code Sec. 11-107 provides "The liability of the operator of an aircraft carrying passengers, for the injury to or death of such passengers, shall be determined by the rules of law applicable to torts on land arising out of similar relationships." The court held that it is well established in this state that the duty towards a guest passenger riding by invitation in another's automobile is that of slight care; and the absence of such care is gross negligence. It follows, according to the court, that the liability of the operator of an aircraft carrying passengers by invitation and gratuitously is that of slight care. The definition of slight care, in Georgia Code Sec. 105-203 is "In general, slight diligence is that degree which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. . . . The absence of such care is termed gross negligence."

The Committee is not in possession of the ultimate determination by legislatures which have before them bills which if passed would effectuate guest statutes, but we are advised that the State of Nevada has passed a bill which appears to be modeled on the proposal above stated except that it provides that the guest shall be entitled to recovery where the accident is proximately caused by "the intoxication, wilful misconduct, or gross negligence" of the pilot, owner, etc.

It is worth noting that should the words "gross negligence" be interpreted in other states with the same liberality that it is interpreted in California, it would have to ultimately be eliminated from the statute. The California interpretation reduced gross negligence to nothing more than ordinary negligence, and, following that interpretation by the Supreme Court, the legislature eliminated the term "gross negligence" from the "guest law" section of our Vehicle Code.

It is the belief of the Committee that the guest statute as applicable to Aviation Law is a salutary one, and that it is bound to be helpful in maintaining insurance rates at a level where they can be afforded by the owner and operator of airplanes.

The Attempt of the Civil Aeronautics Board to Provide Compulsory Insurance by Regulation

The effect of House Bill 7270 in the 82nd Congress of 1952, had it passed, would have been to give the Civil Aeronautics Board power and authority over compulsory aviation insurance. Apparently the Civil Aeronautics Board has concluded that congress will not enact such legislation and therefore has attempted to take unto itself, without legislative action, or executive approval, the power and right which it sought by H. B. 7270. To do so the Board must depend entirely upon the Civil Aeronautics Act of 1938 as amended —Section 401 (f) being the specific section relied upon. That section empowered the Board to impose on the exercise by the carriers of the privileges granted by a certificate of public convenience and necessity, such "reasonable" terms, conditions, and limitations as the public interest might

require. While the term "public interest" must be read in the light of Section 2 of the Act, the Board claims that it is clear that, even though the said section does not include control of insurance, it does not restrict the meaning of the term to the items specified therein, but also permits the Board to take cognizance of almost anything it chooses to consider as affecting the public interest in general.

Under such an interpretation it would seem that the Board's authority is unlimited, and that it is circumscribed only by whatever the Board itself might interpret as "affecting the public interest in general."

Influenced by the afflatus of such a self-centered determination, the Board, under date of December 16, 1952, published a proposed new rule known as Economic Regulations, Draft Release No. 58, entitled "Financial Responsibility Requirements for Air Carriers and Foreign Air Carriers." By this proposed new rule the Board would have accomplished nothing more nor less than compulsory insurance. The draft preamble is interesting, to say the least, because of the reasons it gives for the required financial responsibility. It calls attention to the fact that several states have found it in their own public interest to impose minimum standards on operators of *automotive equipment*, and that the Federal Government has imposed similar obligations under the Motor Carrier Act of 1935. However, no claim is made, or provable that any air carrier, foreign or domestic, has failed to respond to damages, or that, therefore or for any reason, there is a proven need for the drastic step which the Board attempted. Merely because of the fact that such legislation has been enacted with reference to motor carriers, the Civil Aeronautics Board decided that it should take unto itself all responsibility over aviation insurance, stating without documentation, or attempt to prove, that the need "is even greater in the case of air carriers." The Board states that "The larger mass and far higher speed of present day transport aircraft, as compared with automobiles, trucks and busses, involves a property destructive potential much in excess of that of service vehicles, with a correspondingly increased possibility of high judgment in the event of accident. Reparation of damage so caused should not be left to the personal fortunes of individual aircraft operators, nor to corporations whose major assets may have been totally destroyed by the crash." In other words, although the personal fortunes of said individuals and the assets of the air corporations have been entirely adequate in the past, yet, the Board takes the position that the only real safety can be found in its own paternal protection—"grandmotherly protection," as an English writer recently expressed it. Of course, the competence of air operators to meet their obligations, or to insure themselves to cover such emergencies, has been proven. On the other hand, it has not been proven that the Civil Aeronautics Board is a competent insurance authority.

On behalf of its members the Air Transport Association filed a brief opposing the authority of the Board, and in that brief it was contended:

"1. *The Civil Aeronautics Board Does Not Have Authority to Promulgate the Proposed Regulation.*

(a) Under Sections 205 (a) and 416 (a) of the Act and in accordance with general administrative law principles, the Board may issue regulations only in implementation of granted powers.

(b) The power of the Board to regulate air-carrier insurance or financial responsibility for payment of tort judgments does not appear in any express provision of the Act.

(c) The power of the Board to prescribe the method by which air carriers shall meet their financial obligations in connection with tort liability cannot be implied from the Act.

In connection with the implied power claimed, point (c) above was supported fully that: (1) the power to impose the proposed regulation cannot be implied from the authority under Section 401 to attach conditions to the exercise of the privilege granted by a certificate; (2) a financial responsibility regulation is not essential to air carrier regulation under the Act; (3) the structure of the Act negates any implication of such power; (4) the history of compulsory airline financial responsibility legislation negates any implication of such power; (5) Public Law 15, 79th Congress, negates any implication of such power; (6) if, notwithstanding the clear structure of the Act and legislative history to the contrary, it were to be assumed that Congress by implication intended in the Civil Aeronau-

tics Act to authorize the Board to regulate air-carrier insurance and financial responsibility for payment of tort judgments, such delegation of legislative authority would be unconstitutional.

II. *The Imposition of Compulsory Insurance Requirements on Certificated Air Carriers Would be Unreasonable and Unsound.*

(a) The reasons advanced by the Board do not warrant such action.

(b) Such action by the Board would be unsound for other reasons. Air carrier insurance is an intricate problem. The insurance policy is not standard, but each carrier, depending upon his particular needs, negotiates a special and complex contract with the insurance company. Aviation insurance cannot be standardized as it would be under a government bureau, and such an attempt could only be to the detriment of the certificated air carrier, and therefore of the public. Also, there would be created international repercussions from such unilateral action.

Of course, the proposed CAB rule does not simply require that air operators be insured. All air carriers are presently covered adequately by insurance in amounts in excess of those proposed, and the CAB knows it. What they appear to want is complete control of insurance as that is exactly what they set out to get in the proposed regulation. The effect is to change the relationship of insurance from a contract between insurer and insured and socialize it to the point of making it a contract for the benefit of the third party claimants. The proposed regulation does not simply say that each carrier shall have an insurance policy for certain limits. It proceeds to write the policy by requiring an endorsement subjecting the policy completely to the rules and regulations of the CAB. Then, it proceeds to make such regulations as:

'The company hereby agrees to pay, within the limits of liability hereinafter provided, any final judgment recovered against the insured for (passenger, property damage, etc., as covered) resulting either from negligence in the operation, maintenance, or use of aircraft in air transportation or from such other occurrences, acts or omissions in the course of operation, maintenance, or use of the aircraft in air transportation as constitute a lawful basis for the judgment under applicable Federal, State, Territorial, or Local statutes or laws. Within the limits of liability provided, it is further agreed that no condition, provision, stipulation or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the company from liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof, or insolvency or bankruptcy of the insured.'

The regulation provides all of the exclusionary clauses permitted and states that no others may be inserted in the contract. It provides that the coverage may not be cancelled except after thirty days' notice in writing, beginning after the notice is actually received by the Board in Washington. While incomplete, the above shows that the Board intends to completely write and dominate the insurance contracts it will approve. Of course, alternate guarantees of financial responsibility, such as, cash bond and self-insurance are offered, but since such alternates are generally impractical, it does not remove the fact that it is just plain compulsory insurance, and insurance drawn to satisfy social rather than business interest. Like the Rome Convention, the security is obviously for the benefit of the claimant public."

Conclusion Re Compulsory Insurance

It continues to be the opinion of the Committee that compulsion is not a sound basis for the establishment of insurance. It likewise is our conclusion that the attempt of the Civil Aeronautics Board to accomplish compulsion, in the face of the refusal of Congress to do so, is an improper extension of the Board's authority.

Comments Concerning Comparative Negligence

As indicated at the beginning of this report, it is now the view of the Committee that although the ultimate study of the controversy, between those who favor contributory negligence and those who favor comparative negligence, may not be one for study of this Committee; nevertheless, the theory of law is one in which aviation has a major stake. These comments are not intended to be by way of detailed analysis, but are merely intended

to cover what we envisioned to be the over-all picture, and the prospects which they hold for the future.

We are satisfied that the proponents of the bills which have been introduced in the various states, for the elimination of contributory negligence as a defense and the establishment of comparative negligence as an overall substitute, are those members of the bar who not alone specialize in damage suits, but are advocating "the more adequate award." The principal field of attack has been the State of California, but similar statutes have been instituted in many of the legislatures throughout the country. The format of this law does not follow that of any of the five states in which some form of so-called comparative negligence is now in effect. The law, as proposed in various states and vigorously lobbied for in California, would undoubtedly increase the cost of litigation, and in settlements, which inevitably would increase premiums — an increase which would come from the pocketbooks of a reluctant public, a public that is all too prone anyway to criticize insurance companies and insurance rates.

The surface contention that comparative negligence is a more humane law does not seem to stand the light of serious scrutiny or a fair analysis. Without being controversial concerning the fact that the law may have worked to the satisfaction of some of us who are practicing in the comparative negligence states, nevertheless, it is the opinion of the Committee that, as an over-all project, it would ultimately lead to nothing more nor less than a bureau form of administration of tort claims losses. It is the opinion of the members of the Committee that such an ultimate change in the administration of tort laws would not benefit the public, and certainly that it would not benefit the practitioner. Specifically, it is believed by the chairman that, in a state as populous with persons and automobiles as California, and in one where the people are as litigious as they are there, the rule of comparative negligence, should it become a law, will ring the death knell to the fine art of trial practice, and to those fine standards of "private enterprise" practice which have been the bulwark of this organization.

One of the reasons that the Committee now presents this comment is that we believe that the activities which we have above mentioned in the various legislatures of the country, form a pattern which is a warning to all of us. It is probable that what the proponents seek as their ultimate goal is a type of law which will give the large and usually unconscionable verdicts which have been recovered under the Federal Employers Liability Act and the Jones Act. As against this ultimate objective, it is fair to state that no one as yet has offered proof that the rules of contributory negligence do violence to justice! For a more complete discussion of this problem we suggest the reading of the article by one of our members, Gordon H. Snow, Esq., general counsel for Pacific Indemnity Company which appeared in the Insurance Law Journal, April 1953, No. 363 pages 235-243.

CONCLUSION

The Committee appreciates the opportunity to have been of some little service in presenting a somewhat different issue, related to insurance law, in the hope that thus it may have been of service in calling to the general attention of the Association the fact that the troops of the enemy are afoot in the effort to destroy contributory negligence, and to substitute in its place an insidious law which would be applicable to negligence alone, to wit, that where two people are wrong the law will favor him who is the least wrong. The violence that such an act would do to fair dealing between litigants, seems apparent.

Respectfully submitted,

FORREST A. BETTS, *Chairman*
W. PERCY MCDONALD, *Vice Chairman*
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STANLEY C. MORRIS, *Ex Officio*

SUPPLEMENT TO REPORT OF AVIATION COMMITTEE

Subsequent to the preparation of the attached report, the Civil Aeronautics Board handed down its ruling to the effect that

it did not possess the power to require aviation companies to carry insurance. In other words, it held, in accordance with our conclusions in this report, that it did not have the authority to do that toward which the hearing seemed to be pointed.

This terminates another effort at compulsory insurance, but the mere fact that it was attempted carries with it the warning that the forces seeking this law are still at work.

THE COMMITTEE.

Report of Casualty Committee

THE Casualty Committee of the International Association of Insurance Counsel, after correspondence among the members, decided to prepare this study of counterclaims. It includes a general survey of the effect that the handling of the insured's defense has upon the insured's right at a later date to present a cause of action for his damages.

I.

When an insured turns over suit papers to his casualty carrier, the insurance counsel must not only prepare to defend the suit but must also consider what effect the insurance company's defense and handling of the suit will have upon any rights of action of the insured arising out of the same accident.

Under the Federal rules, and in many states, the insured who has a cause of action for personal injuries or damages arising out of the same transaction or occurrence must present that claim by counterclaim. If he fails to do so, this precludes his right to recover in a subsequent action.

In many states counterclaims are permissive. The insured has the option of presenting his claim by counterclaim or by another suit. In many of those states, however, you still have the possibility that the insured's cause of action will be prejudiced by trial, settlement and dismissal of the suit because he may later be faced with the defense of *res judicata* or *estoppel*.

The Casualty Committee of the International Association of Insurance Counsel has prepared this study of some of the leading decisions. The study, of course, does not include all of the decisions and is at best a general treatment of this important subject.

II.

Counterclaims are of two types: Mandatory and Permissive. A mandatory counterclaim is one which must be pleaded or the cause of action is lost. A permissive counterclaim is one that may be pleaded, but failure to so plead does not affect the cause of action.

Rule 13 (a) of the Federal Rules of Civil Procedure makes mandatory the filing of counterclaims in actions brought in the federal courts, provided the cause of action:

(a) is within the jurisdiction of the court,
(b) is not the subject of a pending action,
(c) is mature and owned by the pleader at the time of filing the answer,
(d) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim,
(e) must be against the opposing party in the same capacity,
(f) does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

III.

The general rule is that when a counterclaim is mandatory, the defendant is no longer free to decline battle in the forum chosen by the plaintiff, and failure on the part of the defendant to assert his counterclaim precludes his right to recover in a subsequent action.

IV.

Those states which have made the filing of counterclaims mandatory have generally adopted the Federal Rules of Civil Procedure relating to counterclaims. Some states have not adopted the Federal Rules. They have by statute or court interpretation made the filing of what amounts to a counterclaim mandatory. Other states have made it mandatory to file counterclaims in some types of actions and permissive in others. If in this study a state is designated

mandatory or permissive, that designation is for tort litigation only. In the following states counterclaims are mandatory:

Arizona	Minnesota
Arkansas	Missouri
California	Montana
Colorado	Nevada
Delaware	New Mexico
District of Columbia	North Carolina
Florida	Texas
Idaho	Utah
Iowa	Virginia
Kansas	

In the following states counterclaims are permissive:

Alabama	New York
Connecticut	North Dakota
Georgia	Ohio
Illinois	Oklahoma
Indiana	Oregon
Kentucky	Pennsylvania
Louisiana	Rhode Island
Maine	South Dakota
Maryland	Tennessee
Massachusetts	Virginia
Michigan	Vermont
Mississippi	Washington
Nebraska	West Virginia
New Hampshire	Wisconsin
New Jersey	Wyoming

V.

In those jurisdictions having compulsory counterclaim statutes, if the insurer presents a defense of the insured and the insured does not file a counterclaim before the suit is settled and dismissed, it is very likely that he will be precluded from presenting a cause of action in another suit. The Supreme Court of Missouri so held in the case of *Keller v. Keklikian,* 244 SW (2d) 1001. In a prior action Keller, the plaintiff in this lawsuit, was the defendant in a suit to recover damages resulting from an automobile collision. Since he was insured he turned the suit papers over to his insurance company in accordance with the provisions and terms of his insurance policy. The insurance company settled the case and filed a stipulation dismissing the lawsuit. Later he filed this lawsuit for his damages and the court held that by his failure to so assert his counterclaim, he was precluded from bringing this cause of action. The court said:

"All that appears from the pleadings is that an action was instituted against him and that pursuant to the terms of his policy, he turned the petition and summons over to his insurance company and the cause was disposed of by stipulation without notice to him. This is not to be understood as delimiting the rights, duties or actions of an assured and his liability insurance carrier under the terms of their policy; but it is to say that in the pleaded circumstances, in the absence of any further factor, the assured, Keller, must have known by reason of his contact that some action would necessarily be taken by his insurance carrier in the suit instituted against him and to that extent at least the company and its lawyers were his authorized agents and acted for and in his behalf when they entered into and filed the stipulation."

VI.

In cases involving two or more vehicles where passengers are claiming injuries, the settlement or defense of such claims can affect the right of the insured to present a cause of action in a later lawsuit.

In a recent North Carolina case, *Snyder v. Keenan Oil Company, et al,* 235 NC 119; 68 SE (2d) 805; and 38 CCH Automobile Cases, 711, the plaintiff was a passenger in an auto operated by Dixon which collided with the truck of a corporate defendant. The plaintiff filed suit against the corporate defendant and its driver. The defendant then moved the court to join Dixon as a defendant. Dixon, in her answer, pleaded that since the corporate defendant settled with her and her husband, the corporation was barred from recovering from the defendant by contribution or cross claim.

The court held:

"The settlement by the corporate defendant of the claim of defendant Dixon against it for personal injuries and property damages resulting from the collision of the truck being operated by Keen, the agent employee of the oil company, and the automobile being operated by defendant Dixon, has effectually adjusted and settled all matters which arose or might arise out of said collision, as between the oil company and Dixon, as would a judgment duly entered in an action between said parties. By said compromise settlement each party bought his peace respecting any liability created by the collision. The adjustment of said

claim by the payment of the amount agreed constituted an acknowledgment, as between the parties, of the liability of the oil company and the nonliability, or at least a waiver of the liability, of the defendant, Dixon."

In another recent North Carolina case, *Lumberton Coach Company v. Stone,* 235 NC 619; 70 SE (2d) 673; and 39 CCH Automobile Cases, 662, the plaintiff's bus and defendant's tractor-trailer were involved in an accident resulting in the death of and injury to the bus passengers and the demolition of both vehicles. In a prior action the administrator of a deceased passenger filed a lawsuit alleging concurring negligence of both the Coach Company and Stone. Both the Coach Company and Stone in their answers denied negligence and alleged that the negligence of the other party was the sole proximate cause of the injury. A settlement agreement was reached in that case and by agreement a judgment was entered against both defendants which was later satisfied by both defendants.

The plaintiff then sued the defendant truck company for the loss of its bus and the defendant pleaded *res judicata* as a defense. The court held that the prior judgment was determinative in subsequent actions as to all matters in question material to the adjudication and this would apply whether the judgments were by consent of the parties or based on the findings and verdicts of a jury. The defendant truck company was, therefore, entitled to set up the prior judgment as a bar to recovery on the part of the plaintiff bus company.

VII.

In those jurisdictions where a counterclaim is permissive rather than mandatory one must consider the possibility that the insured's right of action may be prejudiced by the defense, settlement and dismissal of the lawsuit. The insured might in a later lawsuit find that his cause of action is barred by the defense of *res judicata* or *estoppel.*

In the New Jersey case of *Kelleher v. Lozzi,* 80 A. (2d) 196, in the first lawsuit Lozzi sued Kelleher in trespass. Kelleher answered stating three special defenses. At the pretrial conference it was stipulated by counsel and signed by the court that negligence and contributory negligence were matters in dispute. Kelleher settled with Lozzi. The paper of dismissal was signed and filed with the court. It stated: "Please take notice that the above entitled cause is hereby dismissed without cost to either party against the other." Later Kelleher filed this lawsuit against Lozzi. The court held that Kelleher, by settling with Lozzi, acknowledged a valid claim and, therefore, he was estopped from taking the opposite position in the second lawsuit. The opinion in this case does not indicate whether an insurance company was involved or not.

In another New Jersey case, *DeCarlucci v. Brasley,* 83 A. (2d) 823, a lawsuit was filed by DeCarlucci against Brasley and Hayden for personal injuries and property damages allegedly resulting from the negligent operation of the defendants' automobiles. Hayden filed a counterclaim against the plaintiff and a cross claim against Brasley. Before the trial an agent of the plaintiff's insurance carrier settled the counterclaim of the defendant, Hayden. A stipulation of dismissal was filed which stated, "It is hereby stipulated between the attorneys for the respective parties that the counterclaim filed by the defendant, Ernest Hayden, is hereby dismissed without cost to either party." The stipulation was signed by the attorneys for the plaintiff and the attorneys for Hayden. Hayden then moved for a summary judgment of dismissal of the plaintiff's suit. The motion was denied. The appellate court upheld the denial of this motion. The court reasoned that under the standard provisions of an insurance policy the company has the right to try or settle the case, but this right certainly does not extend to the point where it deprives the plaintiff of his right to maintain a suit in his own behalf where the conduct of the insurance company in settling the counterclaim against the plaintiff was without his knowledge, consent, participation, approval or cooperation.

The court distinguished this case from the *Kelleher case,* supra, by stating:

> "The facts which impelled the court to reach its result in *Kelleher v. Lozzi,* supra, are in sharp contrast with those facts in the case under consideration. There a consideration was paid by the defendant to the plaintiff in settlement of the controversy, a release given, and a stipulation of dismissal signed by the attorney for the plaintiff and defendant. It is patent that there was participation by both parties to the settlement, or, at least, there was silence on the part of

the insurance company if such company was involved in carrying out the negotiations of settlement. The facts lack the element of settlement by a third person (insurance carrier.)"

In another case of *Isaacson v. Boswell,* 86 A (2d) 695, the New Jersey Superior Court again held that settlement of a lawsuit by an insurance carrier did not preclude the insured's right of action for his damages. In that case the trial court had dismissed the insured's action but the appellate court reversed the judgment and in so doing stated that since the settlement was independently negotiated by the insurer without the knowledge and consent of the insured in accordance with the terms of the insurance policy, the action of the insurance carrier did not affect the right of action of the insured against the opposing party.

In the State of Pennsylvania counterclaims are not mandatory; however, in the case of *Karp v. Delmonte,* 41 Luz. L. Reg. 337, after an action for damages arising out of an automobile accident had been settled by agreement and stipulation, the defendant and his wife brought suit against one of the plaintiffs in the first action for damages. The defendant contended that since the cause of action arose out of the same accident, the settlement of the previous lawsuit constituted a waiver and release. It was held that the defendant in the first action could not sue either of the plaintiffs in the first action, but since his wife was not a party to the first action, she was not precluded from presenting her cause of action.

We find that in another case of *Cohen v. M. K. Ovalle Company,* 48 Dauphin 235, a Pennsylvania court reached exactly the opposite conclusion. The court held that since there was not a judgment in the original case but only a settlement, nothing was adjudicated and the principle of *res adjudicata* did not apply. The court went on to say that the question of *estoppel* is merged into the question of *res adjudicata,* and it cannot be said as a matter of law that the payment on the plaintiff's behalf was such conduct as to *estop* the plaintiff from bringing suit where the doctrine of *res adjudicata* cannot be applied.

Another Pennsylvania case illustrates the importance of carefully preparing stipulations for dismissal to avoid possible prejudice of the insured's rights. In the case of *Baumgartner v. Whinney,* 39 A. (2d) 738, decided by the Pennsylvania Superior Court, the plaintiff sued the defendant in trespass. The defendant answered denying liability and counterclaimed. The insurance carrier of the defendant negotiated a settlement and an order was filed directing that the suit be marked "settled, discontinued and ended." Thirty-three months later the defendant's son, an administrator, filed a petition to strike the words "settled and ended" from the order of discontinuance and to add thereto the words "so far as the claim of the plaintiff is concerned only." The trial court sustained the petition to strike and from this order the plaintiff appealed. The appellate court held that the attorneys should have known the legal effect of their signature and if they did not wish to include the counterclaim in the settlement, they had ample opportunity to limit the effect of the signature.

VIII.

It would appear that the responsibility of the insurance carrier should be confined to the defense of the insured in accordance with the standard provisions in the insurance policies relating to defense and settlement of suits and claims against the insured. The standard policy is silent as to any obligation of the insurer to ascertain whether the insured has any claims against the opposing party. The policy does not obligate the insurer to assist the insured in the prosecution of his claims against the opposing party. It will be noted from the decisions, supra, that some courts have recognized the limited participation and responsibility of the insurance carrier. On the other hand, in the Missouri case of *Keller v. Keklikian,* supra, the court did not recognize the limited obligations of the insurance carrier and rendered a decision very prejudicial to the rights of the insured.

IX.

Is an insurance carrier under a duty to notify its insured that he must file a counterclaim or take some action to preserve his claim? The Committee's research has disclosed no cases holding that an insurance carrier is under an obligation to notify the insured that his rights might be

prejudiced by his failure to take some action. The Committee also has been unable to find any cases holding that an insurance carrier should respond in damages for failure to ascertain or advise an insured as to his claim for damages against a plaintiff. As a matter of good business practice, however, in those states where counterclaims are mandatory, the insurance carrier probably should notify the insured that his failure to present a counterclaim or take some action might prejudice his right, if any, to recover for his damages. If the notice clearly indicates that the carrier cannot advise the insured as to the merits of his claim or the advisability of his making a claim, there should be no proper objection to this procedure. In those jurisdictions where counterclaims are permissive and the insured's failure to present a counterclaim in the initial lawsuit may prejudice his right, if any, to recover for his damages, the same procedure should be followed.

Respectfully submitted,

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Report of Fidelity and Surety Committee

A RECURRING problem among surety companies writing modern fidelity bonds is the issue of the extent and circumstances under which losses, as reflected by so-called "inventory shortages," attributed by the insured to the alleged dishonesty of a bonded employee, may form the basis of liability against the company underwriting such losses. Very little has been published on this phase of surety law in recent years, despite the frequency of reported litigated cases, and it was felt by the Committee that its attention should be directed toward an up-to-date report on the problem, in an attempt to bring into focus the problems present and discuss the solutions presently adopted by the courts of various jurisdictions.

The Committee has been very fortunate in being able to prevail upon Mr. George C. Bunge of Chicago to prepare the report. Mr. Bunge has written several articles and has delivered speeches to various professional groups on the subject of inventory shortages, one of which was published in the Journal in April 1944. He has been a member of the Fidelity and Surety Committee of this Association, and is now vice chairman of the Committee on Fidelity and Surety Insurance Law of the Insurance Section of the American Bar Association. At our request, Mr. Bunge has revised and summarized his recent work on this subject and has consented to the publication of the following article as the committee report.

The chairman and members of the committee wish to express their thanks to Mr. Bunge for making available to them this article, which we hope will prove a very useful source of material on the subject to the members of the Association.

INVENTORY SHORTAGES

George C. Bunge
Chicago, Illinois

Perhaps the most vexing problem with which fidelity insurers have to contend is that of inventory shortages.

A so-called "inventory shortage" ordinarily arises when it appears that merchandise or other property which should be on hand according to the insured's perpetual inventory or other records is not actually there. Modern fidelity bonds commonly protect the insured against "loss" through the dishonesty of his employees. If and insofar as an "inventory shortage" represents an actual loss, and is caused by the theft, misappropriation, or other dishonest act of a bonded employee or employees,

it may be covered by the fidelity insurer's bond. It ordinarily is not covered, however, if and insofar as it is a "bookkeeping discrepancy" or "paper shortage" only, and does not represent an actual loss, or is caused by other factors not involving the dishonesty of a bonded employee.

Of course, the mere existence of an inventory shortage does not necessarily indicate either an actual loss, or dishonesty on the part of any employee. It is seldom indeed that a physical count of the merchandise on hand will tally exactly with the perpetual or other inventory records of any business establishment, no matter how often the merchandise is checked or how honestly and carefully the records are kept. Furthermore, such records are sometimes based upon estimates or averages which are at best mere approximations, and at worst are affirmatively misleading. Also, at least fifty-seven varieties of honest error or mistake may, and at least some of them usually do, creep into records of this kind. Shoplifters and sneak thieves can, and often do, make off with substantial amounts of merchandise without fault or even knowledge on the part of any employee. The possibilities of creating inventory shortages in these and other ways not attributable to the dishonesty of employees are virtually limitless. The difficulty lies in determining whether and to what extent a given inventory shortage represents or reflects an actual loss, and whether and to what extent any actual loss which may have been sustained is caused by the dishonesty of employees for whom the fidelity insurer is responsible.

Since some discrepancies between the inventory records and the actual count of merchandise on hand are normal in most business establishments, it is usually either the appearance of an unusually large discrepancy, or the discovery of some relatively small specific defalcation, which produces an inventory shortage claim. An unusually large discrepancy does not necessarily mean that any employee has been dishonest; it may be accounted for by erroneous accounting procedures; by an unusually large mistake or series of mistakes; by unusually numerous and skillful shoplifters; or a variety of other reasons. Similarly, the fact that an employee has been caught redhanded stealing a 50 cent screw driver, or putting 50 cents paid by a customer into his pocket instead of the cash register, does not necessarily mean that he has misappropriated all or any substantial part of the hundreds or thousands of dollars worth of merchandise that the inventory happens to be "short." In practically all such cases, it is difficult, if not impossible, to determine definitely whether and to what extent the dishonesty of bonded employees has contributed to the particular inventory shortage for which reimbursement is claimed. Admissions or so-called confessions of dishonesty by the employees in question are sometimes available, but are frequently highly unsatisfactory to the fidelity insurer, for various reasons. In a great many cases, however, admissions or direct evidence of the dishonesty of any employee are not available, and the claimant relies entirely upon proof of the existence of the inventory shortage, and of circumstances which are claimed to indicate that it must have been caused, in whole or in part, by the dishonesty of some employee or employees. These are the most difficult cases of all from the standpoint of the fidelity insurer. One reason that they are so difficult is that the insured often sincerely believes that he has sustained a substantial loss through employee dishonesty, notwithstanding that the evidence he is able to produce seems highly speculative and unconvincing to the surety. Another is that the insured is likely to assume that any "inventory shortage" necessarily constitutes a "loss," and that employee dishonesty is somehow involved, and to be impatient with surety company representatives who attempt to point out that this "ain't necessarily so."

When and to What Extent Does an "Inventory Shortage" Constitute a "Loss" for Purposes of a Fidelity Bond?

In considering this question, it is of first importance to distinguish between inventory records kept on a "unit" basis, that is to say, in terms of items or quantities of actual goods, wares, or merchandise, and inventory records kept in terms of dollar totals calculated on the basis of or with reference to average markup, estimated gross profits, or the like.

A business establishment which keeps perpetual or other inventory records on a "unit" basis, will have a record at all times of what specific items of merchandise should be on hand. Such records make it possible to determine, when a physical count discloses shortage, just what particular items, and how many of them, are miss-

ing. If the records are correctly kept, this kind of an inventory shortage truly represents an actual loss of specific property which can be identified, and is known to have been on hand. This may also be true where such records are kept in terms of dollars, where sales slips and invoices covering all transactions are preserved, and it is possible for accountants by analysis and compilation to determine just what it is that should be on hand and is not actually there.

Many business establishments, however, make no attempt to keep inventory records upon a "unit" basis. Instead, they estimate, by one formula or another, the aggregate dollar cost of the merchandise which has been sold during a given period, and on this basis calculate the dollar value of the inventory which should be on hand at the end of the accounting period. One method of making this calculation is to assume that all merchandise sold bears a certain average markup; another is to assume that a certain gross profit was realized on all merchandise sold. Calculations based on these assumptions and on the sales records, will produce a figure representing the assumed aggregate cost of all goods sold during the accounting period. By deducting this figure from the total of the opening inventory and the cost of all purchases made during the accounting period, the aggregate dollar value, at cost, of the closing "book" inventory is determined. This figure is obviously an estimate, pure and simple, since it is based upon and derived from an estimate of the average markup or gross profit realized during the accounting period. A physical count of the merchandise on hand is then taken, and compared with this "book" inventory. Since it would be a miracle if the "book" inventory, computed on the basis of averages or estimates of this character should ever turn out to be exactly correct, it is certain that there will be either an "inventory shortage" or an "inventory overage" whenever a physical count is taken.

However, an "inventory shortage" resulting from this kind of calculation does not necessarily, or even probably, reflect any actual "loss." Such an "inventory shortage" may signify only that the average markup or estimated gross profit assumed for purposes of the calculation is greater than the markup which was actually realized, in the particular accounting period, and that the computation of the amount of goods, wares, or merchandise which ought to be on hand is consequently erroneous, for any one or more of innumerable reasons, many of which have nothing to do with the dishonesty of employees. Because the "book inventory" is calculated in terms of dollar totals, rather than in terms of specific items of merchandise, it is not possible in such cases to determine, definitely, from the records themselves, whether anything is actually missing, and if so, what. This kind of an inventory shortage is really only a "bookkeeping discrepancy" or "paper shortage," and the fact that it exists does not, in and of itself, demonstrate necessarily or even probably, that there has been an actual loss.

Of course, it is possible that an employee or employees may have been dishonest, and that the employer has suffered an actual loss as a result thereof, notwithstanding that the "book inventory" with which the physical inventory is compared to produce an "inventory shortage" is essentially an estimate. The point is that it is impossible to ascertain the true facts with any certainty from records of this kind, and that the existence of an "inventory shortage" of this character does not indicate either that there has been an actual loss, or the extent of any actual loss that has occurred, much less that it was caused by the dishonesty of any employee.

In *Baker & Co., Inc. v. Indemnity Insurance Co. of North America*, an unreported decision, decided in 1949, the New Jersey Superior Court had occasion to pass upon a claim that the bonded managers of plaintiff's Chicago office had misappropriated $5,739.45, being the amount by which the express charges which they claimed to have incurred exceeded one-tenth of one percent of sales, which such charges had averaged in several preceding years. In substance, the plaintiff claimed that because such expenses had averaged one-tenth of one percent of sales in prior years, the fact that they exceeded that ratio under the administration of the bonded manager, demonstrated the existence of a "shortage" to the extent of the excess, attributable to the dishonesty of the manager. In rejecting this claim, the court said that plaintiff's accountant "predicated an assumption of liability on the bond on an assumption of a loss, neither of which is established by a fact, which as a matter of law, cannot be done," and that "loss insured against must be proved by facts, not

assumption." This is a good example of a claimed shortage which is actually a "paper shortage" or "bookkeeping discrepancy" only. Of course, if you start out with the assumption that express charges are or should be one-tenth of one percent of sales, you will always have either a "shortage" or an "overage," since it is practically impossible for the actual charges, whatever they may be, to coincide exactly with such an estimate. The situation is exactly the same, in principle, when an "inventory shortage" is produced by calculations based on average markups or estimated gross profits.

The distinction between an actual loss and a "paper" loss produced by the method of inventory calculation, is also recognized in *Stadham Co. v. Century Indemnity Co.,* (1950) 167 Pa. Super. 268, 74 Atl. (2d) 511. In that case, the surety was held responsible for an inventory shortage of merchandise kept in a warehouse. The court said:

> "The possibility that the loss was only a paper loss resulting from an error in the inventory is excluded by evidence showing a record of eighteen years of accuracy in the taking of such inventories. There is no suggestion of a price change which, if not compensated for on the inventory cards, would result in an apparent shortage, and further, the plaintiff kept an itemized list of its stock which disclosed that specific items were missing."

To summarize:

1. When the insured maintains perpetual inventory or other inventory records on a "unit" basis, an "inventory shortage" indicates that specific items which can be identified are actually missing, assuming, of course, that the records are correctly kept.

2. When, however, the insured calculates the amount of inventory which should be on hand in terms of dollar totals on the basis of average markups or estimated gross profits, there will always be either an inventory shortage or overage when a physical count is taken, and the mere existence of an "inventory shortage" under such circumstances does not necessarily or even probably indicate that the insured has sustained any actual loss.

Of course, once a loss has been established, the insured must go further, and show that it was caused by employee dishonesty, to recover under a fidelity bond. But the first step is to establish the existence of an actual loss in some specific amount. And this is not done by proof of an inventory "shortage," produced by companies of a physical count with a "book inventory," which is essentially nothing more than an estimate.

What About "Abnormal" Inventory Shortages?

A claimant will often admit that inventory shortages are usual in his establishment, and may be attributable to many factors other than employee dishonesty, but will contend that during a particular period his shortage was "abnormal" or, in other words, was greater than usual. The contention is that to the extent that the "inventory shortage" is "abnormal," it was brought about by some unusual or "abnormal" cause, assumed by the insured to be the dishonesty of his employees, and reflects an actual loss. The essence of this argument is that a deviation from the average or "normal" in inventory discrepancies justifies the conclusion, both that there has been an actual loss, and that employee dishonesty is responsible for it.

Standing alone, the fact that an inventory "shortage" is larger than usual, particularly when it is produced by an inventory computation based upon average markups, estimated gross profits, or the like, is not particularly significant. There may have been abnormal markdowns or abnormal bookkeeping errors of one kind or another, during the period in question. Also, even if it be assumed that the insured has sustained an actual loss, the mere existence of an "abnormal" inventory shortage does not indicate that employee dishonesty was involved. It could as well have been caused by abnormal shoplifting by outsiders, or by other abnormal losses, rather than by employee dishonesty.

It has long been the general rule that to sustain an inventory shortage claim under a fidelity bond, the assured must produce evidence that at least tends to show that a loss has been sustained through employee dishonesty, and to exclude all other explanations for it.

In *Cobb v. American Bonding Co. of Baltimore* (CCA, Tex. 1941) 118 Fed. (2d) 643, the claim was based on the evidence of inventory shortages in all of the eight retail stores owned by the plaintiff, but no specific defaulters or defalcations were identified. The court commented that "Un-

der the bookkeeping system used by the plaintiff, shortages would be reflected by any number of things other than dishonest conduct of employees," and concluded that the evidence:

> " . . . creates no more than surmise or suspicion that some of the shortages reflected by the inventories might have been due to dishonesty on the part of an employee or employees. Verdicts may not rest upon guess or conjecture, and where, as here, the probative force of all of the evidence of the plaintiff does not go beyond the point of creating a mere surmise or suspicion it becomes the duty of the trial court to instruct a verdict for the defendant."

In *Gaytime Frock Co. v. Liberty Mutual Insurance Co.* (CCA Ill. 1945) 148 Fed. (2d) 694, plaintiff "offered to prove what constituted normal shrinkage and allowance for shoplifting in similar type businesses," apparently on the theory that the existence of a greater than "normal" inventory shortage justified the inference that the excess constituted a "loss" caused by employee dishonesty. This offered evidence was rejected. The Court of Appeals said:

> " . . . In our case there was no direct or affirmative proof at all that plaintiff had suffered any loss by theft or other dishonest act of any employee. To be sure, the fact that the shortages were caused by the dishonesty of plaintiff's employee or employees may be established by circumstantial evidence, but the evidence to establish the fact must be of such a nature that it is the only conclusion that can fairly or reasonably be drawn, that is to say, such evidence must fairly and reasonably exclude any other explanation."

Proof that an inventory shortage is "abnormal," standing alone, clearly does not meet this test. The "abnormal" size of the inventory shortage may be due to many things other than employee dishonesty, and the so-called "shortage" may not reflect any actual loss at all. An "abnormal" inventory shortage may furnish the occasion for investigation by the insured, but unless and until the reason for it is definitely ascertained, the mere fact that it exists does not justify an inference either that there has been an actual loss, or that it has been caused by the dishonesty of any employee. In short, as the court held, in substance, in the *Gaytime Frock Co. case*, the mere fact that an inventory shortage is "abnormal" does not, in and of itself, prove anything at all with respect to a claim under a fidelity bond.

It has been suggested, in a recent U. S. District Court decision (*Morrow Retail Stores, Inc. v. Hartford Accident & Indemnity Co.*, U. S. Dist. Ct., Idaho, May 4, 1953, 111 Fed. Supp. 772), that it is possible to establish that maximum losses from all causes other than employee dishonesty could not exceed a certain amount, and that the existence of an "abnormal" inventory "shortage" in excess of that amount may then be shown to establish both employee dishonesty and the amount of the actual loss. When, as was true in that case, the inventory "shortage" itself was computed on the basis of estimates or averages, the legal soundness of this conclusion is very doubtful, to say the least.

Suppose That There Is Direct Proof of Dishonesty on the Part of One or More Employees

When the employee's dishonesty and the extent of the loss attributable to it are fully established by direct as distinguished from circumstantial evidence, there is, of course, little question as to the surety's liability. However, such a simple and clear-cut situation seldom occurs in inventory shortage cases.

When direct evidence of dishonesty is available, it often consists of the testimony of some store detective or shopping service agent, who has caught an employee in some small misappropriation; the testimony of customers or other persons who have direct knowledge of a few such transactions; receipts or similar documents signed by the accused employee; and admissions or confessions of the accused employee. The difficulty is, that this direct evidence often covers only a small part of the inventory shortage for which reimbursement is claimed, thus creating a very difficult problem for the surety. Does the fact that an employee is shown to have been dishonest in a number of specific instances, coupled with the existence of a much larger inventory shortage, otherwise unexplained, which could have been caused in a similar fashion by the same employee, justify the inference that such employee created the entire inventory shortage by committing other dishonest acts similar and in addition to those spe-

cifically proved? Some cases seem so to hold.

Of course, the problem is not particularly difficult where an actual loss of specific, identified merchandise is established, for which the dishonest employee might or could have been responsible. Under these circumstances, most courts would probably leave the entire question of the extent of the claimant's loss to the jury. Cases of this type include the recent decisions in *Stadham v. Century Indemnity Co.* (1950) 167 Pa. Super. 268, 74 Atl. (2d) 511, and *National Shirt & Hat Shops v. American Motorists Insurance Co.* (1952) 234 N. C. 698, 68 SE. (2d) 824.

The real difficulty arises when an employee has been apprehended on some small defalcation, and the insured then discovers that it has a large "abnormal" inventory shortage for the period in question, which is arrived at by a computation based upon average markups, estimated gross profits, or the like. "Abnormal" inventory shortages of this character are based on estimates, and are often the product of accounting procedures, and the insurer is understandably skeptical of such claims. It is usually impossible in such cases, to determine what, if anything, is actually missing, other than the few specific items which can actually be traced to the dishonest employee. At the same time, the insured, having caught a dishonest employee redhanded, is usually convinced that he has actually sustained a large loss through additional peculation of the same employee; that his accountant's calculations should be taken at face value; and that the insurer, therefore, should honor his claim in full.

As above stated, the existence of an "abnormal" inventory shortage logically is of no legal significance, when it is predicated, upon accountant's estimates and calculations of this character. This remains true, even when one or more dishonest employees have been apprehended, since the amount of the inventory "shortage" does not necessarily have any relationship to the actual loss sustained through employee dishonesty, and certainly is not a reliable measure of that loss. Nevertheless, the existence of an "abnormal" inventory shortage at the time some employee, or employees, is found to be dishonest, undoubtedly creates grave practical problems, as far as the adjustment of the claim is concerned.

It is believed, however, that an "abnormal" inventory shortage of this character (i.e., based on accountant's calculations on averages or estimates) has no more legal significance when employees can be shown to have been dishonest by other proof, than when direct evidence of dishonesty is not available. In either case, such an inventory "shortage" is, at bottom, nothing more than the insured's, or his accountant's, own estimate or opinion of the amount of his loss. When the proof shows that actual, identifiable inventory items are missing, it is a very different matter.

The Conclusive Proof Clause

It is now pretty well settled that the "Conclusive Proof" clause on fidelity bonds simply requires the claimant to prove his case by a preponderance of the evidence.

In *Stadham Co. v. Century Indemnity Co.*, (1950) 167 Pa. Super. 268, 74 Atl. (2d) 511, the court said:

> "The phrase 'conclusive evidence,' when used in an insurance policy, is not to be given its technical meaning; it merely serves to cast upon the assured the burden of introducing evidence which excludes any other theory than that the loss was occasioned by the risk insured against."

In *National Shirt and Hat Shops v. American Motorists Insurance Co.*, (1952) 234 N. C. 698, 68 S. E. (2d) 824, the court held that the "conclusive proof clause" did no more than impose upon the claimant the burden of establishing his claim and of excluding all other hypotheses by the "greater weight of evidence."

All in all, the "conclusive proof" clause, as it has been interpreted and applied to date, seems to have little, if any, practical effect in inventory shortage claims upon fidelity bonds, except, perhaps, to insure that the claimant must maintain the burden of establishing the existence of an actual loss, and of negating all reasonable hypotheses which might account for it, other than the dishonesty of his employees.

CONCLUSION

The greatest difficulty in inventory shortage cases arises from the failure to distinguish between inventory shortages which represent an actual loss of identifiable goods, wares, or merchandise, and so-called "shortages" which are actually no more than generalized estimates.

When an actual loss of identifiable goods, wares, and merchandise is shown, there remains only the relatively simple question of whether, and to what extent that loss was caused by employee dishonesty.

When, however, the inventory "shortage" in question is really only a generalized estimate, it is impossible, from the inventory records, at least to determine whether there has really been any actual loss, much less the amount of such actual loss as may have been sustained, if any. Consequently, the claim must actually be procured upon the basis of such other evidence as may be submitted.

The following table of additional cases and annotations consists of decisions which have not been cited or discussed in the foregoing article, or in the previous article published in the April 1944 Journal (Vol. XI, No. 2, Page 32). They relate to or have some bearing on the subject matter. They were collected by Mr. Bunge and are cited here for convenient reference.

TABLE OF CASES

Dixie Fire Insurance Co. v. American Bonding Co., (1913) 162 N. C. 384, 78 S. E. 430.

Drumbar v. Jeddo-Highlands Coal Co., (1944) 155 Pa. Super. 57, 37 Atl. (2) 25.

Durham Pepsi Cola Bottling Co. v. Maryland Casualty Company, (1947) 228 N. C. 411, 45 S. E. (2d) 375.

Employer's Liability Assurance Corporation v. Kolp, (Tex. Civ. App., 1941) 149 S. W. (2d) 209.

Fidelity & Deposit Co. v. Cunningham (1928) 177 Ark. 638, 7 S. W. (2) 332.

Glens Falls Indemnity Co. v. Gottlieb (1947) 76 Ga. App. 70, 44 S. E. (2d) 706.

Glens Falls Indemnity Co. v. Gottlieb (1949) 80 Ga. App. 634, 56 S. E. (2d) 799.

Handelman's Chain Stores v. Maryland Casualty Co., (La. App. 1938) 184 So. 827.

Hartford Accident & Indemnity Co. v. Collins-Dietz-Morris Co. (C.C.A. Okla. 1935) 80 Fed. (2d) 441.

Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Stores, (Miss. 1951) 49 So. (2d) 813.

Indemnity Insurance Co. of N. A. v. Krone (1928) 177 Ark. 953, 9 S. W. (2d) 33, 60 A. L. R. 1493.

Nye & Niessen, Inc. v. Central Surety & Insurance Company (1945) 71 Calif. App. (2d) 570, 163 Pac. (2d) 100.

Raymond Farmers Elevator Co. v. American Surety Co., (1940) 207 Minn. 177, 290 N. W. 231.

Riggs v. American Surety Company (1950) 217 La. 406, 46 So. (2d) 313.

Sproul v. Stein, (1944) 348 Pa. 269, 35 Atl. (2d) 61.

Thompson Lumber Co. v. Interstate Commerce Commission (Commerce Court, 1912) 193 Fed. 682, 684.

U. S. F. & G. Co. v. Adams County (1913) 105 Miss. 675, 63 So. 192.

U. S. v. National Casualty Co., (D. C., Ia., 1946) 5 F. R. D. 275.

Annotations:

Extrajudical admissions by principal as evidence against surety, 60 A. L. R. 1500.

Provisions of Burglary or Theft Policies as to evidence of Loss, 169 A. L. R. 224.

Respectfully submitted,

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Report of the Financial Responsibility Laws Committee

THE scope of this report is "the problem of the uninsured motorist and his uncompensated victim," suggested by the speech of the Honorable Alfred J. Bohlinger, Superintendent of Insurance of New York at Syracuse 1951. Basic and fundamental, of course, is accident prevention. While traffic safety has to be impressed on every motorist through legislation, enforcement and education, those topics are deemed beyond the purview of this committee. Opinions and data so well covered in prior issues of this Journal, notably July 1950, October 1951 and July 1952 should be reviewed by interested readers. Consideration will be extended to new members and readers only by way of a recapitulation. Insurance counsel should be well informed with respect to its many ramifications, because the subject is of such

tremendous importance to the insurance business as well as the public. Actually the legislative years of 1953 and 1954 may well produce such radical changes in leading states as would materially affect the livelihoods of all connected with insurance. We should be guided accordingly; we should be particularly alert and active in our opposition to unfavorable legislation and militant for suitable laws.

Should any member wish information concerning any act or bill pending in his state, including the position taken by the organized insurance industry with respect thereto, such will be furnished upon request to the undersigned chairman of this committee.

In passing, it is recommended that the International Association take the necessary steps at its next annual meeting to change the name of our Committee to the more appropriate "Safety-Responsibility Laws Committee."

This report covers the approximate period from May 20, 1952 to May 20, 1953. The following separate topics may now be considered as properly included within the scope of the Committee:

1. FINANCIAL RESPONSIBILITY LAWS, "OLD TYPE."
2. SAFETY-RESPONSIBILITY LAWS, "SECURITY TYPE."
3. UNSATISFIED JUDGMENT FUNDS, "UJF."
4. IMPOUNDING LAWS.
5. COMPULSORY INSURANCE LAWS.
6. AUTOMOBILE COMPENSATION PLANS.
7. INSURANCE DECISIONS—VOLUNTARY AND CERTIFIED POLICIES.

Most of these topics will be considered briefly under the following subdivisions:

A. *Explanation or Definition.*
B. *Where Enacted; New Acts.*
C. *Legislative Developments, viz:*
   (1) General Amendments.
   (2) "Tempering" Modifications.
   (3) Operation; Climate for Future Enactments.

The Committee gratefully acknowledges the assistance of the various services, publications, reports, digests and charts of the Law Department of the Association of Casualty and Surety Companies, 60 John Street, New York 38, New York under the direction of Ray Murphy, General Counsel, Marcus Abramson, Assistant Counsel, and A. Farkas, Editor, particularly a copyrighted publication of that association entitled "Automobile Liability Security Laws of the United States and Canada."

I. *"Old Type" Laws*

A. The feature of the "Old Type" laws is the furnishing of proof of ability to satisfy all liability for *future* accidents only. Such proof is required only *after* certain convictions or the failure to satisfy judgments. Such laws do not constitute a sufficient threat to uninsured motorists to induce them to obtain coverage; they have "no teeth" because they are inapplicable to *past* accidents. Sufficient prosecutions either criminal or civil to bring the law into force simply do not occur. Attorneys plainly do not take uncollectible cases to judgment.

Where Enacted—New Acts

B. This antiquated type of law remains unchanged in only four states: District of Columbia[1]; Kansas; New Mexico; and South Dakota—and the five Canadian provinces: New Brunswick; Ontario; Prince Edward Island; Quebec; and Saskatchewan. With reference to Ohio see 2-B, below. Also note under 3-B, below, that Ontario and Prince Edward Island have "UJF." Ontario probably will not achieve a maximum of insurance coverage until it passes a "Security Type" law.

Legislative Developments

C. (1) Ontario—The Highway Traffic Act, 153 Amendment—penalties of Sec. 81 (1) (a) shall not apply to *insured* motorists.

South Dakota—S. B. 32 of Reg. Sess. 1953—suspension of license for failure to satisfy judgments—effective Jan. 1, 1953.

2. *"Security Type" Laws*

A. Under these Security Type or "Safety-Responsibility" laws the motorist must post security for each accident on penalty of loss of all driving privileges *and* he must also, for a prescribed or indefinite period, furnish proof of ability to pay for future accidents. The purpose is to impose such severe requirements (in the absence of in-

[1]D. of C.—Security Type bill is pending in Congress.

surance) that the motorist is induced to obtain necessary coverage voluntarily before an accident happens. There does, of course, remain the possibility (reduced in proportion to the reduction in the number of uninsured cars) that the victim of a negligent uninsured motorist will remain uncompensated. In operation, these laws have been highly successful in decreasing the uninsured to 5 or 10% and to 3 plus per cent in New York (1952). Not to be overlooked is the safety factor, resulting from the uninsured motorist's fear of tangling with this law.

Where Enacted; New Acts

B. This type of law is now in force or about to become effective in all but the four states and five provinces listed above under paragraph 1-B.

A Summary of "Security Type" Laws Newly Enacted

State	*Citation*	*Effective Date*
Arkansas	H.B. 349 Ark. Reg. Sess. 1953.	June 11, 1953
Louisiana	Act No. 52, Acts of 1952.	Oct. 1, 1952
Missouri	Chap. ..... Reg. Sess. 1953 (H.B. 19).	Aug. 29, 1953
Newfoundland	Highway Traffic Act of 1951, Part 7.	April 1, 1952
New Jersey	Chapter 173, 1952	April 1, 1953
North Carolina	Chap. 1300 Session Laws of 1953 (Tempered)	Jan. 1, 1954
Ohio	H.B. 168, Laws of 1951 §§6298-1 to 6298-93 General Code.	Mar. 1, 1953

Note: The Arkansas and Ohio laws do not follow the model bill of the Association of Casualty and Surety Companies entirely. Among the variations in Ohio, the *claimant* is required to present evidence to the Registrar of Motor Vehicles concerning his injuries or property damage within 50 days from the accident date otherwise, after notice to such claimant, no deposit of security will be required. Releases from the guardian of a minor for an amount under $200 will be acceptable without court approval (a comendable feature).

Legislative Amendments–1953

C. (1) Hawaii–Chap.–Reg. Sess. 1953–requires "proof" upon convictions of unlicensed persons–effective May 14, 1953.

Indiana–Chap. 65 Reg. Sess. 1953–removes assessment of expenses on insurers – effective March 5, 1953.

Chap. 276 Reg. Sess. 1953–exempts operators of post office trucks–approved March 14, 1953.

Iowa–Chap.....Reg. Sess. 1953 (S. B. 267) –insurer to notify Commissioner within 15 days when policy not in effect, etc.– effective July 4, 1953.

Maine–Chap. 67 Reg. Sess. 1953–period for proof limited to three years–Secretary may suspend or revoke on basis of facts in his records (also require proof) –effective retroactively to July 26, 1941.

Maine–Chap.....Reg. Sess. 1953 (S. B. 460)–increases insurance limits to 10/20 and 5–effective 91st day after adjournment.

Maryland–Chap. 582 Reg. Sess. 1953–increases minimum p.d. for security following accident to $75; 5 days for reporting; 90 days for Department to act; increases limits to 10/20 and 5; no security for person whose damages have been paid by another; and restoration of license and registration when one year has elapsed from date of suspension, if no suit–effective–June 1, 1953.

Minnesota–Chap. 258 Reg. Sess. 1953–increases minimum p.d. accident for security to $100–effective April 8, 1953.

Minnesota–Chap. 660 Reg. Sess. 1953–increases insurance limits to 10/20 and 2 –effective April 24, 1953.

Nebraska–Chap.....Reg. Sess. 1953 – increases minimum p.d. accident for security to $100. Effective.....

New York–Chap 605 Reg. Sess. 1953–after furnishing "proof" for 3 years, insured person may substitute standard policy on certain conditions–effective April 9, 1953.

Ohio–Chap.....Reg. Sess. 1953 (H.B. 5)– appropriates funds–effective Feb. 26, 1953.

Rhode Island–Chap.....Reg. Sess. 1953. S. B. 355. Decreases from 3 to 1 year the

period for "proof" after conviction or judgment—effective May 1, 1953.

Tennessee—Chap. 192 Reg. Sess. 1953 — brings rent-a-car or truck people fully under the act—effective April 10, 1953.

Utah—Chap.....Reg. Sess. 1953 (H. B. 123)—injured person must furnish evidence of extent of damages within 50 days from accident date; no security for injury to spouse or child; employee's accident jeopardizes all registrations in name of employer; chauffeur loses only private driving privilege; U. S. A., Utah and political subdivision vehicles exempted; payment to injured by another acceptable in place of security—effective May 13, 1953.

Vermont—Chap.....Reg. Sess. 1953 (H. B. 299)—technical changes; exempts parked cars—insurer to notify Commissioner in 15 days if no coverage in effect—effective October 1, 1953. S. B. 77 (awaiting Governor's signature) increases insurance limits to 10/20/2.

Wisconsin—Chap.....Reg. Sess. 1953 (S. B. 47). Awaiting Governor's signature—insurance limits increased to 10/20 and 5 —effective.....

"Tempering"

C. (2) Indications of "tempering" appear above in the amendments in certain states but they are based mostly on sound practical experience and should make administration more effective. However, the following legislative and administrative developments would seem to defeat the principal purpose of the laws or to weaken them:

Delaware—Chap.....Reg. Sess. 1953 (H. B. 108)—discretionary with Commissioner to temper suspension where person's occupation or livelihood require driving privileges.

Montana—Officials will not verify insurance certificates unless misrepresentation is suspected.

North Carolina—Chap. 1300 (supra) — Court review stays suspensions—registrations not suspended, only licenses.

South Carolina — Department will "spot check" cases for misrepresentations of insurance. (Open to abuse).

West Virginia—Chap.....Reg. Sess. 1953 (S. B. 315)—exempts convictions for driving without license as first offense—effective June 12, 1953.

Operation—Climate for Future

C. (3) For legislative possibilities present and future see Best's Insurance News, Fire and Casualty Editions for November 1952, page 51, December 1952 page 95 entitled "Do We Have the Answers?" Also March 1953 "Compulsory Liability Insurance."

Members of the International Association who are so disposed might use their influence to the end that the "Old Type" law will be replaced by the "Security Type" law in those few states and five provinces which have not done so and to oppose efforts to repeal these laws.

New York reports that the average deposit of security made by uninsured motorists has increased from $193 in 1951 to $203 in 1952. More than 96% of cases were insured.

In South Dakota in 1952 an effort to amend the law became involved with compulsory insurance provisions in the bill and it would have been passed except for the untiring efforts of a few capable men. The result is that the "Old Type" law remained. 1953 saw a feeble "Judgment Law" passed to date.

New Jersey's Legislative Committee will continue its study (authorized in 1952) of its new law even before it goes into effect.

There is no definite evidence that the Security Type laws have affected accident frequency or insurance rates as yet according to Insurance Law Journal, November 1952, pp. 771, 2 "Report to the Missouri State Chamber of Commerce."

In Oklahoma and Texas bills to repeal the law have failed. Similarly in South Carolina H. B. 1051 was carried over to 1954.

Resolutions are pending to study financial responsibility laws in Congress H. R. 45; Michigan H. C. R. 55 and Pennsylvania H. R. 15.

Chart Analysis of "U J F" Laws

Where Enacted Effective Date	*Annual Tax*	*Years Collected*	*Minimum Applicable Judgment*	*Applicable Hit & Run Cases*	*Recoverable Limits*	*Misc. Comment, Features*
1. North Dakota (7/1/47)	$1 registrations	1948 only (until 1953)	$100	B. I. only	5/10/1	Depleted at end of 1952 necessitating 1953 assessment.
2. New Jersey (4/1/55)	½ of 1% of auto insurance premiums plus $1 insured; $3 uninsured registrations	(1955)	$200	B. I. only (?) also insurers must defend defaults and doubtful cases	5/10/1	Excludes Workmen's Compensation Law cases also uninsured motorists, their families and passengers.
		• • •				
3. Alberta (4/1/47)	$1 registrations	1947	$100	B. I. only	5/10/1	Plus hospital and medical expenses.
4. British Columbia (1/1/48)	$1 registrations (voluntarily assumed by insurers to date)		$100	no	5/10 no p.d.	Reported working satisfactorily — low insurance rated area.
5. Manitoba (1/1/46)	$1 registrations in 50c registrations in	1946 1947	$100	yes	5/10 no p.d.	Depleted, probably 50c tax in 1953.
6. Newfoundland	To be determined Licenses	-------	$100	no	5/10/1	(New)
7. Nova Scotia	50c licenses	?	$50	no	5/10/1	
8. Ontario (1/7/47)	$1 licenses (for 1953)	50c 1947 to 1952	No min.	B. I. only ($440,000 paid to date)	5/10/1	Attorney General may and usually does participate in defense.
9. Prince Edward Island (1946)	$1 registrations	1946 to 1952 (?)	$100	B. I. only	2/4/1	

Note: All 9 jurisdictions have concurrent Security Type Laws except Ontario and Prince Edward Island. Interesting also is the minimum applicable amount. Claimants with small claims receive no benefit from these laws—except in Ontario.

3. *"U J F"*

A. Under the Unsatisfied Judgment Fund laws motorists and/or insurance companies supply the cash. The uninsured motorist (judgment debtor) loses motoring privileges until he reimburses the fund in full—which few ever do. Time and space have been allotted here because this plan has been employed along with Security Type Laws to combat Compulsory Insurance (e.g. in N. D., N. J. and Canada) and recently as a supplement to Compulsory, a bill was introduced as a companion to the Compulsory bill (both of which failed in New York, 1953), called the Assigned Case Plan (ACP), proposed to fill the gaps left by uninsured "outlaw" cars, and "out-of-state" cars, also "hit and run" and stolen car cases. Such would be assigned in rotation to and paid by private insurers. The idea is to meet one of the UJF's most objectionable features by not permitting a large fund to get into the hands of the state.

Where Enacted

B. See chart analysis. North Dakota and New Jersey only in U. S. A.

Legislative Climate for Future

C. (3) Canadians apparently are enthusiastically boosting UJF. On both sides of the border, it is argued that while these laws admittedly tax the prudent insured, the rash uninsured gets absolutely nothing from the fund—except a notice to repay or else keep off the roads. So insureds benefit doubly: (1) they are offered a chance to collect from negligent "judgment proof" drivers and (2) they reap the safety factor of the removal of the uninsured and their "jalopies" from the highways—if this can be enforced.

Your Committee has an open mind. Most insurance executives have opposed UJF—but many of them would prefer it to Compulsory Insurance. It is considered "socialistic" and may prove unworkable in times of depression; if successful it will be touted as a replacement for private insurance; it cries out for efficient administration—which politics seldom permits. Some insurance men and lawyers (e.g. Henry Moser of Allstate and Association of the Bar of City of New York) favor this law; other "authorities" believe that 1953-54 will see the choice of either UJF or Compulsory (and perhaps both, in New York, California, Pennsylvania and other states). The former seems the lesser evil to us. Perhaps the New Jersey plan is the answer. Insurance department people there are boosters.

Legislative Action 1953

A large crop of UJF bills was introduced this year but none have passed. There are four bills pending in New Jersey to amend: H. B. 158, 357, 447 and S. B. 307. In North Dakota S. B. 201 amending the UJF was enacted—the Fund must be named as defendant and attorney general shall defend or appoint special counsel (good)—effective.....

4. *Impounding Laws*

A. The purpose of automobile impounding laws is to further persuade motorists to insure—to add "teeth" to a Security Type law. Generally, if "security" (or insurance) is not immediately deposited, (or certified) the police *must* impound the car until: (1) a release is obtained from the injured or damaged party *and* (2) proof of financial responsibility for future accidents is certified. If no claimant action results in six months, the car is released. Several Canadian provinces have and recommend it. None of our states has such a law.

B.

Where Enacted	*Misc. Features*
Alberta (1947)	Impounding discretionary, in case of B.I., death or $75 p.d.
British Columbia (1948)	Compulsory—B.I., death or $50 p.d.
Manitoba (1946)	Compulsory—B.I., death or $50 p.d.
Prince Edward Island (1950)?	Compulsory—B.I. or p.d. in any amount, upon application of *claimant*. Vehicle released on $500 max. security in form of ins. policy or otherwise etc.

(NOTE: Most of the areas affected are not heavily industrialized nor thickly populated).

C. (3) "Security" type plus "Impounding" laws have been credited with reing the percentage of uninsured cars to 5%. Such laws have been urged by

prominent Americans including bar associations and insurance counsel who have studied the problem (e.g. Henry Moser, Esq. of Allstate); have been proposed by the Association of the Bar of the City of New York and producer agents') organizations there; also in Wisconsin. They would be effective only as the public sees them vigorously and impartially enforced. One advantage is the removal of the accident car from the road whenever its operator is uninsured. "Tempering" in favor of cars essential to livelihood of owners—alas, could hardly be avoided; still worse would be laxity in areas controlled by "political machines"—conditions not so important in Canada nor in most "low rated" territories. The committee has an open mind; obviously the enforcement problem is paramount in thickly settled areas, where the protection is most needed.

"Impoundment" bills were introduced this year in Connecticut, New York and Wisconsin. The Connecticut and New York bills failed but the Wisconsin bill is still pending.

5. *Compulsory Automobile Insurance*

A. Such a law makes the purchase of a statutory liability policy a prerequisite to the *registration or use* of a vehicle. Massachusetts (the only state so far) requires all residents and, effective July 23, 1952, *non-resident* owners, lessees or bailees, having a place of business in that state *and* using cars or trailers in connection with said place, to insure and to register therein.

Where Enacted—New Acts

B. Most states and the Federal Government have required such insurance as a condition for licenses to carry persons or property for hire. Massachusetts has had compulsory *bodily injury* liability insurance since 1927. (In his message to its legislature for 1953, the newly elected governor, Hon. C. A. Herter expressed his disapproval of this law in no uncertain terms). New York (1951), Rhode Island and Connecticut have compulsory insurance laws for minors *owning* cars; New York (1952) for minor *operators,* also Connecticut for minor *operators* between 16 and 18 years. The Connecticut limits are 20/20/1; New York's are 10/20/5 and Rhode Island's are 5/10/1 in such cases.

Operation—
Climate for Future Enactments

C. (3) Opponents, usually but not necessarily connected with the automobile insurance business (including agents and brokers) vigorously object to Compulsory Insurance. Briefly they feel that:

(a) It does nothing to attack the source of the problem, namely, the appalling frequency and increasing severity of accidents; on the contrary it appears to aggravate this already intolerable situation; it glosses over or mollifies the real disease: carelessness and laxity of enforcement of traffic laws.

(b) It, of course, appeals to many, including politicians and greedy plaintiff's attorneys (who may be cutting their own throats); it will substitute more rigid (even than now) bureaucratic controls over the business; and will probably revert to state insurance in most states.

(c) It will increase (rather than decrease) insurance premiums to each motorist; as verdicts and settlements must increase, somebody has to pay—the motorist—"You know who."

(d) The logical result, if and when controlled by monopolized state insurance funds, is of course further political mismanagement.

(e) The trend under "Compulsory" is for decreased or minimum limits and coverage—whereas today most people carry *excess* limits—and medical reimbursement insurance too. It will not avail the negligent against either the careful or negligent defendant (in most states).

The New York legislature of 1953 defeated "Compulsory." Proponents opening and closing guns were fired by Governor Dewey, himself. The opposition was too strong. Organized companies, agents, brokers, other insurance executives, even the Association of the Bar of the City of New York widely published reports *of their objections* to this law. American Mutual Alliance turned up *for* the bill. The "victory" has been termed merely an armistice; next year may see a different result—

unless the insurance industry presents a more united front *in favor of constructive proposals.* Extremely close votes featured the defeat of the bills introduced in twenty-four states this year.

In Wisconsin an interim legislative commission opposed Compulsory Insurance, giving good reasons, as above stated. "Compulsory" for minors hinges on a bill pending in Illinois, having failed in Ark., Ind., and N. H.

The California bill has apparently been defeated for 1953.

Bills have been and will undoubtedly be introduced again and vigorously pressed in at least half of the 1953-1954 legislatures.

NOTE: By next May several states will have gone "over the hill," if the opposition is not militant. Use *your* influence *now* to promote a program *less* likely to injure private enterprise.

6. *Automobile Compensation Plans*

A. One feature of "Compensation Plans" (which have been advocated occasionally but vigorously for over 25 years) is most objectionable to insurers and lawyers: the *abolition of liability for negligence and damages.* Weekly or monthly benefits, plus medical and hospital expenses are awarded to *all,* regardless of fault (as in Workmen's Compensation Laws). Such plans may be open to private insurers *and* to competing state funds or limited to monopolistic state funds, but they necessarily are compulsory. Such laws do not necessarily include the abolition of negligence and damages but may be operated as an adjunct to present principles of tort liability as in the Saskatchewan Plan. There the state fund writes practically all of the automobile insurance business (but private insurers do some business, more each year). That province's government is in control of a *socialistic* party (C.C.F.), supported by a majority of its overwhelmingly rural population. This plan exists nowhere else in America.

Operation—
Climate for Future Enactments

C. (3) The Saskatchewan Plan and arguments pro and con are discussed in detail in "The Problem of the Uninsured Motorist" (1951), a publication of the Insurance Department of New York, Albany, New York, and previously by Superintendent Alfred J. Bohlinger in Best's Insurance News Fire and Casualty Edition for June 1951 at p. 21, "The Uninsured Motorist." These reports concluded: such plans were impractical and too expensive; they could lead certainly to state operated insurance funds. Recent reports from Saskatchewan forecast increases in the rates to motorists for 1953, ranging from 10 to 100 per cent, the fund presently being operated "on a deficit basis." (The Government Insurance Office still promises a 50% saving over current rates elsewhere).

Evidently such plans offer no particular economy nor relief for the motoring public generally. Any reduction in rates to motorists must be made up in general taxation. Our industrial and thickly populated states, where the same benefits would undoubtedly cost motorists considerably more than they do in Saskatchewan, offer seemingly impossible barriers. The safety factor is very low—since careful and careless would collect alike.

Assemblyman Collins of San Francisco, California introduced such a bill (H. B. 8) in that state (Journal of Commerce, 1/12/53). It failed.

7. *Insurance Decisions—Voluntary and Certified Policies*

This innovation to the Committee's annual report should build up a reference source of some value—as recent decisions are added yearly. Cf. 1 A.L.R. 2d 822; 1 Insurance Policy Annotations—ABA 94; "Automobile Liability Security Laws" Association of C. & S. Co.'s "Decisions and Opinions" revised to November 1952; "Impact of Financial Responsibility on Automobile Liability Insurance" Billings, Insurance Law Journal, December 1949, p. 871 and "A Guide to the Automobile Policy," id. p. 869.

Some courts and writers, Mr. Billings for example, in his very comprehensive article (supra), do not distinguish between "voluntary" coverage and "required" or "certified" policies. The latter, being *"proof* of financial responsibility," according to all of these laws, establishes "absolute liability" upon the insurer, in favor of injured

parties, subject only to the "reimbursement clause," as against the insured. This distinction between "automobile liability insurance (standard) policies" which will satisfy the requirements of "security *following* accidents" and "proof" for *future* accidents should be kept constantly in mind in reviewing the cases. For one thing, there is an additional premium for certificated policies (i.e. SR22 filed by insurer—calls for surcharge on standard rates).

Digest of Cases on Insurance

California—Liability is not absolute under a "Financial Responsibility Endorsement" except as to persons subject to the requirement of "proof." *State Compensation Insurance Fund v. Bankers Indemnity Insurance Co.*, 106 F. 2d 368 (CCA 9th 1939).

Illinois—Where the policy was not certified prior to the accident, an exclusion of wilful, wanton or intentional acts was valid under the Financial Responsibility Act. *Hill v. Standard Casualty Co.* (1940, CCA) 110 F. 2d 1001.

As an example of the failure to apply the distinction noted above, probably caused by the lack of clarity in the statute which refers to "a motor vehicle liability or operator's policy" as "proof" and "a liability policy" as "security," (Sec. 42-11 v. Sec. 42-12) where insurer had certified its policy under "Illinois Truck Act" (but not under Sec. 42-11 of the Financial Responsibility Law) the compulsory omnibus clause of that Law was *held* to cover operator, under a garage policy which did not afford omnibus coverage. *Landis, for Use of Talley v. New Amsterdam Casualty Co.*, 107 N. E. 2d 187 (App. Ct., 4th Dist. of Illinois, 1952).

Indiana—No coverage for operator. (Policy not required). *Shadow v. Standard Accident Insurance Co.*, 111 Ind. App. 19, 39 N. E. 2d 493, 13 Auto Cases 906 (1942).

Iowa—Filing of SR21 "Notice of Policy in Effect" held not a "Certificate of Proof" and insurer could plead policy was void *ab initio* for fraud. *Hoosier Casualty Co. of Indiana v. Fox et al* (1952) 102 F. Supp. 214, 37 CCH Auto Cases 1010.

Kentucky—Policy defenses of lack of cooperation and late notice were available to insurer where policy not "required." *Travelers Insurance Co. v. Boyd*, 228 S.W. 2d 421 (1949).

Maryland—Coverage required for taxis and commercial vehicles. Liability absolute. *Keystone Mutual Casualty Co. v. Hinds*, 180 Md. 676, 26 A 2d 761, 15 Auto Cases 251 (1942).

Massachusetts—Numerous decisions applying the statutory coverage—not pertinent outside of the state (as yet). Of interest to non-resident owners, lessees or bailees having businesses in Massachusetts and using cars there in connection with such businesses—but without Massachusetts registration and statutory coverage: owner of motorcycle improperly registered denied recovery under the "outlaw" rule. *Bevacqua v. Ryan*, 326 Mass. 137, 93 N.E. 2d 270, also see *Bean v. Leonard*, 83 N.E. 2d 443, 323 Mass. 606.

New Hampshire—The violation of the condition for coverage of "Newly Acquired Automobiles" by the insured, who failed to give proper notice, does not defeat the coverage as to third parties up to statutory limits 5/10. *Farm Bureau Auto Ins. Co. v. Martin*, 84 A. 2d 823, 97 N. H. 196 (1951), 37 Auto Cases 798, (3 to 2 decision with strong dissent that policy was not "required" so liability not absolute). Required policy covered operation of loading device. *American Mutual Liab. Ins. Co. v. Chaput*, 60A. 2d 118 (1948), 95 N. H. 208.

Deliberate acts of insured covered (policy not required). *Hartford Accident & Ind. Co. v. Wolbarst* (1948) 57 A. 2d 151, 28 Auto Cases 1013, 95 N. H. 40.

New Jersey—Rule seems well established that if insured had brought himself under the Act prior to the accident or was of a class for which proof required, the absolute liability provisions will be applied in *favor of third persons*, precluding *any* policy defenses including misrepresentation in the procurement of the policy, *even though proof not called for* by Commissioner. *Atlantic Casualty Ins. Co. v. Bingham et al*, 83 A. 2d 363 (15 N. J. Super 1951) aff'd. 18 N. J. Super 170, 86 A. 2d 792. Aff'd 10 N. J. 460, 92 A. 2d 1 (11-3-52).

New York—Applies correct rule of no absolute liability, if insurance not required under the act. *Cohen v. Metropolitan Casualty Ins. Co.* (1931) 252 N. Y. S.

841; *American Lumbermens Ins. Co. v. Trask* (1933) 266 N. Y. S. 1 aff'd. no opinion 264 N. Y. 545; hired auto endorsement does not cover lessee. *Chesher v. U. S. Casualty Co.* (1952) 38 Auto Cases 593, 303 N. Y. 589, 105 N. E. 2d 99.

North Carolina—Operator's policy, certified under the statute, does not cover permissive user of insured's car. *Russell v. Lumbermens Mutual Casualty Co.*, 237 N. C. 220, 74 S. E. 2d 615. (2-25-53).

Ohio—One court held that insurer *under a certified policy* was not liable where it had absolutely no notice of the pendency of the action. (Should work no hardship as attorney can ascertain and notify insurer whose name appears on SR22 on file.) *Gergely v. The Pioneer Mutual Casualty Co.*.....Ohio App....., 26 Auto Cases 1148, 74 N. E. 2d 432.

Omnibus coverage not extended if use not permitted by insured. *Gulla v. Reynolds* (1949) 151 O. S. 147, 85 N. E. 2d 116.

Pennsylvania—Exclusion of property "in charge of" not enforceable where insured under a certified operator's policy unlawfully took and damaged a car without consent of owner. *Shy v. Keystone Mutual Casualty Co.*, 150 Pa. Super 613, 29 A. 2d 230 (1942).

Under certified policy the drive-other-car coverage was not excess coverage but absolute and primary. *Polonitz v. Wasilindra*, 155 Pa. Super 62, 37 A. 2d 136, (1944).

Certified operator's policy covered owned car, not included under terms of policy. *Montgomery v. Keystone Mutual Casualty*, 357 Pa. 253, 53 A. 2d 539 (1947).

Vermont—Policy filed under Law (required); nevertheless breach of warranty against carrying passengers for hire avoided coverage. *American Fidelity and Casualty Co. v. Provencher*, 90 N. H. 16, 3 A. 2d 824 (1939), construing Vt. law.

Virginia—Weight of authority favors rule that the Act is not applicable to "voluntary" policy. *Farm Bureau Mutual Auto Ins. Co. v. Hammer*, 177 F. 2d 793 (1949).

West Virginia—What constitutes notice of expiration of certified policy? Commissioner had agreed with Bureau that extra copy filed to turn up on expiration date was O. K. Held: no further notice necessary. *Zurich General Accident Insurance Co. v. Taylor*, 38 F. Supp. 159 (D. C., S. D,. W. Va. 1941).

Permissive use: member of household not named in policy could not grant permission. (A required policy). *Adkins v. Inl'd Mut.*, 20 S. E. 2d 471 (1942), 124 W. Va. 388.

Wisconsin—Constitutionality upheld. *State of Wisconsin v. Stehlek*, 262 Wis. 642, 56 N. W. 2d 514 (Sup. Ct. unanimously reversed Milwaukee County Dist. Ct., Jan. 6, 1953 not ins. case). Wis. Code §85:93 creates direct liability to third parties as of time of accident (based on liability of insured but not contingent on judgment against him). It will be read into policy, *whether certified or not* (also, by the way, see written agreement between insurers and Commissioner of Insurance.) Does not apply to action by insured v. insurer, *Heinzen v. Nuprienok*, 208 Wis. 512, 243 N. W. 448 (1932).

Insured not necessary party even though accident occurred outside the state. *Oertel v. Williams*, 214 Wis. 68, 251 N.W. 465 (1933).

CONCLUSION

With 44 state legislatures in session this year, this report is unduly long. It is timely and of vital importance to all our members, their clients and the public. Let your ideas for a constructive program be known —to the insurance companies and your legislators.

Our purpose has been merely to acquaint you with some of the thinking on this complex topic and some citations, which may prove useful.

Respectfully submitted,
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KENNETH B. COPE, *Vice Chairman*
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Report of the Fire and Inland Marine Committee

YOUR Fire and Inland Marine Committee has functioned only to the extent of requesting an opportunity to present a speaker for the open forum at the Quebec meeting and of preparing some recommendations for future activities of the Committee.

We find that considerable interest is being manifested in the coverage afforded by fire and inland marine insurance policies and feel that a discussion of this subject during the open forum or the presentation of a paper treating of the subject is highly desirable.

We recommend that a sub-committee be appointed to collect decisions involving the construction of fire and inland marine policies and that the citations and points involved be made available to the Association.

We further recommend that cooperation be continued with industry's Joint Fire and Marine Insurance Committee on Radiation.

Respectfully submitted,
ALEXIS J. ROGOSKI, *Chairman*
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Report of the Life Insurance Committee

YOUR Committee has, this year as in former years, confined its observations to a study and reporting of court decisions of unusual importance to the life insurance fraternity and a reference to some new life insurance legislation.

Korea—Is It War?

Prominent in this category has been the timely subject whether the Korean conflict is war. It is no news that the forces of our country have been fighting and dying for three years in large numbers, and it would seem too obvious for controversy that in so doing they are engaged in war in any sense of the word. The question has arisen because of the usual exclusion from coverage in Double Indemnity life insurance which relieves the insurer from liability where death results from accidental means if the insured is "in the military or naval service in time of war" or language of similar import.

Many courts have considered the subject since last year's Committee reported. They have had to determine whether the word "war" used in the policies is intended to mean only a declared or "legal" war rather than a war in the practical sense and within the common understanding of men.

The first of these decisions by an appellate court of a state to attract outstanding attention was by the Superior Court of Pennsylvania in *Beley v. Pennsylvania Mutual Life Ins. Co.*, 15 L. C. 490. A companion decision was *Harding v. Same,* 15 L. C. 560. These decisions were affirmed by the Supreme Court of Pennsylvania, 95 Atl. 2d 202 and 221 respectively. To indicate the importance of the decision, the justices of the Supreme Court in the *Beley case* wrote four opinions, two concurring and two dissenting. They wrote three in the *Harding case,* one for the majority and two dissenting. The policy in each case provided that the company would not be liable for the accidental death benefit ". . . if said death shall result by reason of . . . military service in time of war." Mr. Beley was killed in action in Korea and Mr. Harding was killed in a railroad accident en route to a military training camp in Indiana. In each case the court in substance briefly stated, decided it could not

take judicial notice that the fighting in Korea was war until the United States Government by some act or declaration recognized that it was war. It said the nation was not at "war" in the technical sense, and that was the sense in which the word was used in the policies. The trial court, the Allegheny County Court, in a well reasoned opinion, with one dissenting opinion, went fully into the history of the United Nations' action, cited many provisions of the United Nations Charter and reached the opposite conclusion, saying:

> "Make no mistake about it. This is a full fledged war, not only actual and realistic but politically determined as well. A war too then of which the courts by law can take judicial notice.

Another decision of outstanding importance was handed down May 20, 1953 by Federal District Judge Westover of the United States District Court, Southern District of California, in *Weissman v. Metropolitan Life Insurance Company, unreported.* There, young Mr. Weissman was insured under a policy issued to him when fourteen years of age. It contained provision for double indemnity. That provision had an exclusion from coverage which relieved the insurer of liability if death occurred "while the insured is in the military, naval or air forces of any country at war." Mr. Weissman was inducted into the military services of the United States of America on January 17, 1951 and was killed in action in Korea on August 31, 1951. When sued for double indemnity the insurer defended by asserting the exclusion clause. In deciding the issue thus raised in favor of the insurer and holding that the conflict raging in Korea is "war" within the meaning of the insurance policy, the judge reasoned that at the time that Weissman was insured—only fourteen years of age—there was doubtless no thought in the minds of the parties that he would be killed fighting an enemy and so, when they executed the contract they understood so well the popular meaning of the word "war" that there was no necessity for defining it. Of course, plaintiff contended that the company in using the word must have intended the strict legal sense—its constitutional sense—but the court said that ever since the adoption of the Constitution there has been controversy as to the meaning of the term "war." Of course, the Constitution gives only Congress the power to declare war. Hence the argument there could be no war unless Congress had declared it and, until it had, a court could not take judicial notice. However, the judge referred to the prize cases which considered whether the civil war was a war. He quoted effectively from the opinion in that case where there was no declaration of war by saying:

> "They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race. . . . If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. . . . "

Applying this reasoning to the Korean conflict, Judge Westover reasoned that, because Congress had seen fit to provide money necessary to carry on the conflict, he felt justified in finding that, if a declaration of war were necessary, the Korean conflict has received the sanction of Congress which, in effect, he seems to say, was tantamount to a declaration. He concluded with the observation that he doubted there was any question in the minds of the majority of the people of this country that the conflict in Korea was anything but war.

Another decision on this point was *Western Life Insurance Company v. Meadows,* Texas Civil Appeals, handed down March 6, 1953, in which the insurer thought it was relieved from liability for double indemnity "if the Insured should be in military, naval or allied services in time of war" or for participation in aeronautics "in time of war." Death resulted from military plane crash in Alaska while the insured was in the Army and rode as a passenger. The judgment went against the company on the holding that the Korean conflict is not a war, based on the holdings in the *Beley* and *Harding cases* above.

That the Korean conflict was war was held in the following decisions:

Douglas Mfg. v. Clayton Bros. (unreported) Circuit Court, Douglas County, Oregon, 1952.

Tanner v. Universal Life Ins. Co., (unreported) Circuit Court, Norfolk County, Virginia, 1952.

United States v. Anderson, 1 C. M. R. 345 (U. S. Board of Review, 1952) N. D. Attorney General's opinion, December 20, 1951.

Gray v. Southern Aid Life Ins. Co., 15 L. C. 507. Municipal Ct., D. C., June 5, 1952.

Contra decisions:

McClintic v. Metropolitan Life Ins. Co. (unreported) Super Ct., Marion Co. Ind., February 17, 1953.

Dean v. Atlantic Life Ins. Co. (unreported) Circuit Ct., Wisc. Co., Va., January 31, 1953.

There are several pending undecided cases involving this point, so it is apparent it is of unusual interest to the insurance fraternity.

Attachment—Annuity

Hoffman v. Hoffman, et al (New Jersey Supreme Court, November 12, 1951) 84 A. 2d 441.

The primary question submitted to the court for decision on these appeals is whether payments under this Group insurance policy with annuities payable to a man after retirement who is not a resident of this state, are subject to attachment by his former wife to pay accrued alimony under a judgment or decree of a court in a foreign state, the wife also being nonresident here, where the terms of the annuity policy prohibit assignment by voluntary act or by operation of law.

The Supreme Court said:

"By clear and positive language the garnishee excluded an obligation to pay annuity benefits to anyone other than the annuitant. . . . Unless the plan adopted in the insurance contract was in violation of public policy, it must be upheld. There is no specific statute relating to such an exemption in this state.

• • •

"We are of the opinion that the theory upon which 'spendthrift trusts' are pierced elsewhere for the benefit of a divorced wife should not be extended to cover the present case when the language of the insurance policy is so positive 'or by operation of law.' That is to say, we are confronted with conflicting phases of public policy. On the one hand that policy of this state which upholds the provisions of this group insurance contract as a social security measure to protect retired employees in their old age, and that principle asserted by the plaintiff which if it is applicable here permits a divorced wife to pierce a 'spendthrift trust' created for her husband's benefit. It seems judicious to leave any further pronouncement to the legislature.

• • •

"We are of the opinion that the provisions of the group insurance contract involved in this litigation were valid and enforceable and were not violative of any common law, constitutional or statutory provision, and the judgment of the trial court should be reversed and the attachment dismissed."

Binding Receipt

Corn v. United American Life Ins. Co. (U. S. District Court, D. Colorado. April 10, 1952) 104 Fed. Supp. 612.

The application for an insurance policy of the defendant consisted of two parts: Part 1 contained the application for insurance and Part 2 comprised the medical or health questionnaire. The applicant executed Part 1 and delivered it to the agent, together with a check to cover the first year's premium on the policy. Although the applicant was reminded on several occasions by the defendant of the necessity for a medical examination, he failed to take the same. The applicant was killed in an airplane accident before Part 2 of the application was completed. The defendant denied liability and made a tender of the premium which was refused and thereafter suit was instituted. The court granted the motion of defendant for summary judgment and said:

"There is some confusion among the authorities as to the legal effect of the arrangement disclosed by the record herein. From a study of these decisions, the court is satisfied that many of the seeming conflicts and the conclusions reached therein may be accounted for by the factual differences in the terms of the individual contracts involved. The court, therefore, believes that each contract for interim insurance should be measured on its own merits and in the light of its own particular wording. See *Stonsz v. Equitable Life Assurance Society,* 324 Pa. 97, 187 A. 403; *Colorado Life Co. v. Teague,* Tex. Civ. App. 117 S. W. 2d 849. So considered, there can be little doubt that the hereinabove-

italicized provisos (in Section 2, Part One of the application and in paragraph "first" of the premium receipt), constituted conditions precedent to the effectuation of interim insurance pending issuance of a permanent policy."

To the same effect is *Paulk v. State Mutual Life Ins. Co.* (Court of Appeals of Georgia. February 28, 1952). 69 S. E. 2d 777.

Divorce

Gross v. Gross and Prudential, Third Party (New York Supreme Court, Appellate Division, June, 1952) 114 N. Y. S. (2nd) 117.

The Prudential issued a policy on the life of defendant Gross. Three children of the insured were designated as the beneficiaries therein. The plaintiff, wife of the insured, secured a judgment of separation and subsequently a judgment for unpaid alimony was entered in her favor against the insured. Third party proceedings were instituted by the wife against the Prudential and an order was entered by the lower court, directing the company to pay the cash surrender value of the policy to the wife. The company appealed.

The company contended that the proceeds and avails of the policy were exempt under Section 166 of the New York Insurance Law and that the company was not indebted to the insured *since he had not applied* for the cash surrender value. The wife relied principally on three decisions at Special Term which held that the exemption statute did not apply to an alimony creditor. She further contended that the company would be protected since the insured was before the court and would be bound by its order.

The Appellate Division held: Section 166 of the New York Insurance Law is determinative of the question. The status of the wife is that of a judgment creditor. There can be no doubt from the language of the statute that it applies to all judgment creditors. There is no specific exception in the statute in favor of a wife and the court cannot read an exception into the plain language of the legislature. Judgment reversed.

Whitelaw v. Whitelaw (Ohio Court of Appeals, September 29, 1952) 15 C. C. H. Life Cases 628.

At the time the plaintiff filed her action for divorce she had in her possession two policies issued by Prudential on the life of defendant and prayed the court to award all the right, title and interest of the defendant therein to her. Defendant insured was not served personally nor did he enter an appearance in the action. Service was made upon defendant by publication only. Prudential was made a party defendant and filed a motion to dismiss which was overruled by the court and judgment was entered for plaintiff, granting complete control and ownership of the policies to her. On appeal the Court of Appeals held that the court below was without authority to award the policies to plaintiff where nonresident was served by publication only and reversed the judgment.

Group Annuity

Gelhaus et al v. Eastern Air Lines, Inc., et al (U. S. District Court of Appeals, Fifth Circuit, March 6, 1952. Rehearing denied April 10, 1952). 194 F. 2d 772.

In this suit for damages for breach of contract of employment, to which the Prudential was also a party, plaintiff contended that by virtue of the terms and provisions of the Eastern Air Lines Retirement Plan, which plaintiff joined, a contract of employment could not be terminated without a showing of substantial cause therefor; but that, notwithstanding this, he was wrongfully discharged without cause. The United States District Court for the Southern District of Florida granted defendant's motion for summary judgment and plaintiff appealed. The Court of Appeals held that when a contract of employment stated it might be terminated at will of employer, participation by employee in Group Annuity Plan did not give rights to contract of employment which could not be terminated except for substantial cause when the plan itself provided for cancellation and employee had signed application for and received refund of payments and had given release to insurer. Judgment affirmed.

Misrepresentation—Tender

Smith v. Prudential (Indiana Supreme Court, Oct. 7, 1952) 108 N. E. 2d 61.

The insured was in the Armed Forces until May, 1946. In March of that year he contracted rheumatic fever which resulted in a leaking of two major valves in his heart. He received medical treatments at two Army hospitals and ultimately was

discharged from service on the basis of total disability. Subsequently, on September 9, 1946 the defendant issued a policy on his life based on an application for insurance, wherein the insured denied any prior medical history. The insured was killed in an automobile accident on November 3, 1946. Upon investigation of the claim the defendant learned of the material misrepresentations made by the insured and denied liability. A tender of the premium with interest was made to the beneficiary and refused. Suit followed. At the conclusion of the trial the jury returned a verdict for the plaintiff. The trial court overruled defendant's motion for a directed verdict, as well as its motion for a new trial and the defendant appealed from the judgment entered on the verdict. The Appellate Court, relying in part on the decision of the Supreme Court in the case of *National Life and Accident Co. v. Ransbottom,* 28 N. E. 2d 78, wherein it was held

> " . . . although there are perhaps loose statements in the cases about bringing the money into court, no decision of this court has come to our attention in which it was held necessary that a money consideration must be paid to the clerk of the court as a condition to maintaining an equitable action or defense seeking a rescission of the contract. The offer to return the premiums brought forward and continued in the pleading is sufficient,"

reversed the judgment with instructions to the trial court to sustain defendant's motion for directed verdict upon payment of the premium into court and to enter judgment for defendant. 98 N. E. 2d 382. Plaintiff then filed a petition for rehearing, which the Appellate Court denied. 99 N. E. 2d 431. Thereafter the plaintiff appealed to the Supreme Court which, in short, overruled the *Ransbottom case,* supra, reversed the Appellate Court and held in substance that failure of the defendant to keep the tender good by paying the money into court amounted to a waiver of the fraud.

Need Not Be Fraudulent

Tolbert v. Mutual Benefit Life Insurance Company, 72 S. E. 915, was an action to recover upon a life insurance policy, the defense to the suit being that there were false and material misrepresentations in the application. The Court reaffirmed the rule in North Carolina that a policy of life insurance can be voided by false and material misrepresentation and that such misrepresentations need not be fraudulent.

Occupation

In *DeBellis v. United Benefit,* 93 A. (2d) 429, 15 L. C. 770, the failure of an insured to state his occupation as that of professional gambler was held a material misrepresentation entitling the insurer to void the policy since the real occupation exposed the applicant's life to greater danger than the occupation of medicine salesman which was given in the application. See also *Landau v. Mutual Life,* 199 Fed. (2d) 549 15 L. C. 693 where the misstatement of a medical history was considered fraud although a separate medical examination was made.

In *Baker v. Continental Casualty Company,* 94 A. 2nd, 454 (Md. 1953), the insured, in a group accident and health insurance plan, answered this question in the application, "Have you ever had any injury, sickness or physical condition requiring a doctor's care or a surgical operation? If so, state nature, dates and duration of disability," by saying, "Yes, tonsillectomy—1931." Undisputed testimony showed that for several years previously the insured had had periodic six months x-rays made; that his physician had advised him he had a "spot" on his lung which was suspicious but not conclusive of anything; that no treatment was prescribed. The trial court set aside a verdict for the insured. The Court of Appeals reversed, holding that there is a legal and real difference between "examination" and "care," that the trial court erred in ruling, as a matter of law, that the insured's answer on the application was material and untrue and reinstated the jury's verdict.

For an earlier Maryland case where the court ruled, as a matter of law, that an answer on an application was material and untrue, see *Silberstein v. Massachusetts Mutual,* 55 A. 2nd, 334.

Policy Loan

In re *Estate of Schwartz,* (Pennsylvania Supreme Court, January Term 1952) 87 A. (2d) 270.

In this case the question involved was whether a "policy loan" upon a life insurance policy was a debt of such a nature

as to enable the beneficiary, upon the insured's death, to require the loan to be repaid from the insured's general estate, thus enabling the beneficiary to receive the full insurance proceeds. The court below ruled that it was such a debt and directed repayment. However, the Supreme Court reversed the judgment and ruled: "As an insurance policy loan does not create a debtor-creditor relationship, the beneficiaries of these policies so encumbered are entitled only to the *net* proceeds."

Premium Tax—Colorado

Prudential v. Kavanaugh, Commissioner of Insurance of State of Colorado. (Colorado Supreme Court, January 21, 1952), 240 P. (2d) 508.

Prudential on behalf of itself and all others similarly situated, brought a class suit against the Commissioner of Insurance of Colorado for a declaratory judgment as to the effect of the statute levying a two per cent tax on premiums collected or contracted for on policies or contracts of insurance. Prudential contended that the two per cent tax applied to the premium named in the face of each policy and not to any subsequent divisible surplus made applicable to the policyholder in the form of a dividend when such dividend was used to purchase paid-up additional insurance. The District Court entered judgment adverse to Prudential and Prudential appealed. The Supreme Court held that the tax was applicable only to the premium stated on the face of the policy and reversed the judgment of the court below.

Incontestability—No Conflict with Aviation Clause

Mutual Life Insurance Co. v. Daniels, 125 Colo. 451, 244 P. (2d) 1064 involved a life policy containing a printed incontestable clause and endorsed on the face of the policy an aviation clause stating that death as a result of riding, etc. in an aircraft (except as a paying passenger on a regularly scheduled flight) "is a risk not assumed under this Policy." The insured died during the war while piloting a military plane and after the policy had become incontestable. The trial court directed a verdict for the beneficiary for the principal sum. The judgment was reversed by the Colorado Supreme Court which held that the incontestability statute does not restrict the insurer's right to limit the risk assumed; and the limitation of the aviation clause was a bar to recovery here.

Supplementary Contracts

In *Hall v. Mutual Life of New York* handed down June 9, 1953 the Appellate Division of the New York Supreme Court, First Department, one judge dissenting, reversed the lower court, which had held that a supplementary contract providing for payment of proceeds at the beneficiary's death was invalid as a testamentary disposition which did not conform to the Statute of Wills.

In upholding the validity of supplementary contracts the court emphasized: (1) that supplementary contracts come into existence solely because of a right given in the insurance policy; (2) that the legislative intent, manifested as early as 1906 and as recently as 1952, was to authorize the use of such contracts without conforming to the Statute of Wills; (3) that the decided cases recognized the validity of supplementary contracts and variance from the terms specified in the original policy was immaterial since the supplementary contract, as agreed to by the insurance company and beneficiary, clearly flowed from the original policy; and (4) that the supplementary contract is part and parcel of the system of life insurance and there is a very high public interest in the extension of that system.

Basche v. Travelers Ins. Co., et al (District Court Wapello County, Iowa, September 19, 1952—N. W. 2d—Legal Bulletin American Life Convention; Vol. 67, No. 6, Page 121, December 1952.

Validity of supplementary contract upheld in above case. By the terms of the deposit agreement beneficiary could withdraw money in her lifetime, but if she failed to do so money not withdrawn was to be paid to named beneficiary, the plaintiff in this action. Heirs of the deceased beneficiary contended that the deposit agreement under which the plaintiff claimed was testamentary in character and void. The court, however, held that the contention of the heirs was not sound; that the deposit agreement was a contract made by parties for benefit of a third person; that such contracts have been recognized and sustained for a long period of time and the fact that the contract was not to be performed in the lifetime of the party did not invalidate the agreement.

Constructions of Policy Provisions

Fox v. Order of United Commercial Travelers, 192 Fed. 2d 844, (C. A. 5th 1952), 15 L. C. 71.

Under an accident policy limiting the liability of the insurer if the death of the insured results from the accidental discharge of a firearm "where there is no eye-witness" to the discharge except the insured, the wife of the insured, who heard the shot while in an adjoining room of the same house, sprang to his assistance through an open door, saw her husband after he had been shot and was with the insured at the hospital when he died the same day, was an eye-witness and the jury verdict awarding the beneficiary the face amount of the policy was upheld.

Franklin Life Ins. Co. v. Lewis, Ala. App., 55 So. 2d 518, 15 L. C. 237, (1951).

Insured allegedly suffering from "chronic myocarditis" attempted to recover total disability benefits under a policy which provided: "If illness before described shall wholly, necessarily and continuously disable and prevent the Insured from performing each and every duty pertaining to his occupation, the company will pay . . . the Monthly Illness Indemnity for the period the Insured shall live and be so disabled and necessarily strictly and continuously confined within the house . . . " The evidence showed that insured often went fishing and drove alone fairly often to a town fifty-five miles away. In reversing the judgment for the insured the court held that the quoted clause referred to the seriousness of the illness rather than a course of conduct in an effort to perfect a cure, and that, while the seriousness-of-the-illness test does not require a strict compliance with the clause, the evidence in this case did not show an illness the nature of which confined the insured to the house.

Franklin Life Ins. Co. v. Strength, Ala. App., 58 So. 2d 126 (1951).

This case is substantially similar in facts and holding to the above, making the point that each case in this area must rest on its facts.

Aviation Exclusion—Burden of Proof

Massachusetts Mutual Life Ins. Co. v. Smith, 194 F. 2d 1006, (C. A. 5th, 1952) 15 L. C. 246, reversing on rehearing 193 F. (2d) 511, (C. A. 5th, 1951), 15 L. C. 50.

The insured was last seen about 6:30 A.M. on January 27, 1943, when he was starting in a plane on a trip from Puerto Rico to Trinidad. When the plane, a land-based plane not equipped with life preservers, was last seen it was entering a slight storm front in the open sea. In the suit the insurer did not dispute the fact of death but relied on a clause in the policy limiting liability to the reserve of the policy if the death of the insured "resulted directly or indirectly from operating or being in or on, or riding in, any kind of aircraft, whether as a passenger or otherwise." Evidence was introduced that another plane in the same general vicinity was struck by a shell from a German submarine less than a month before the plane bearing the insured disappeared. The majority of the court held that the burden of proof was on the insurer to prove that death resulted from an aviation hazard and a jury verdict awarding the face amount of the policy was affirmed.

Accident Insurance—Disease Exclusion

Emergency Aid Ins. Co. v. Cornell, Ala. 63 So. (2d) 603, 1 L. C. 2d 12 (1953).

While employed as a sawyer, insured was injured by a falling piece of timber which caused an abrasion on his ankle about the size of a thumbnail. The condition of the leg deteriorated rapidly, necessitating amputation. Insured had previously suffered from osteomyelitis, but, following an operation four years preceding the injury, insured had had neither pain nor inconvenience from the condition. There was evidence that but for such accident, insured might never have had any trouble from the leg. However, but for the prior condition of the insured's leg, there would have been no amputation. The insurer refused payment under a clause which read:

> "injuries, fatal or otherwise, loss or disability caused wholly or in part, directly or indirectly, by disease not caused solely by bodily injury covered hereunder are not covered by this policy."

The court in sustaining a jury verdict for the insured held that the word "disease" does not mean "mere feebleness, nor predisposition to recurrence of former disease, nor every infirmity which may aggravate the effect of an accidental injury," that the pre-existing disease must be an efficient cause of the loss, and that the jury could have found that the osteomyelitis was not an efficient cause of the loss.

Suicide Exclusion—Life Insurance

Insurer refused payment on a life insurance policy on the grounds of suicide within two years after the issuance of the policy. The insured died less than two years after the issuance of the policy. The coroner's certificate listed the death as "suicide." The court, restating the accepted Alabama law that there is a presumption against suicide, that the burden of proof is on an insurer alleging suicide and that motive for suicide is an important element in the proof of suicide, but not essential, held that the evidence warranted a jury verdict that the insured did not commit suicide and that he fell rather than jumped from the window.

Change of Beneficiary by Will

Creighton v. Barnes, 1 L. C. 2d 214, Tex. Sup. 4/8/53 is a very important decision to the life insurance companies and the insuring public. By far the majority of the state courts of the United States do not permit change of beneficiary by will. In this case two policies had been issued to B. B. Barnes. Each contained a provision that

> "Provided this policy be not assigned, the assured may at any time, and from time to time, change the beneficiary hereunder, such change to take effect upon the written endorsement of the same upon the policy by the Company."

The petitioners, mother, daughter and sister, named as beneficiaries at the death of the insured, filed suit for the policy proceeds. The respondent, third wife and surviving widow claimed the proceeds by virtue of Barnes' will which read:

> "I give, devise and bequeath unto my beloved wife, Pauline Barnes, all the property of which I may die seized and possessed, real, personal and mixed, and wheresoever located, for her to have, hold and dispose of as she may see fit.
>
> "At the present time, I have life insurance as follows:
>
> "Jefferson Standard Life Insurance Company policy No. 727-036, for the sum of $10,000.00;
>
> "Jefferson Standard Life Insurance Company policy No. 806-705, for the sum of $15,000.00;
>
> "Farmers & Bankers Life Insurance Company policy No. 50120, for the sum of $2500.00.
>
> "Each of these three policies is being made payable solely to my wife. This information is given for the identification of my life insurance. It is not to be considered a part of my estate."

The insurer interpleaded the claimants. The trial court awarded part of the proceeds to each. The Court of Civil Appeals reversed and awarded all to the respondent, holding that the will had effected a change of beneficiary. The Supreme Court reversed, holding that the policy provision controlled and a change could be accomplished only if that provision were substantially complied with. It found the insured had not done all he reasonably could have done to comply. It was apparently not his intention to change under the Jefferson Standard policies. He did change under the Farmers & Bankers policy. He knew what was necessary to be done to change under the Jefferson Standard policies. The court concluded its reasoning on the principal issue by saying:

> "To permit a change of beneficiary by will in disregard of provisions in a policy which have the same or similar requirements as to method of change, as these two policies of insurance here, would bring about much uncertainty and litigation as to payment of life insurance policies. Prompt payment of life insurance to those who are the beneficiaries is of inestimable importance to those who are left behind at the death of an insured. Delay and confusion resulting in unnecessary hardships should be avoided."

Autopsy—Reasonable Time

In re *Disinterment of Jarvis,* 1 L. C. 2d 179, Iowa, Sup., 4/8/53, 58 N. W. 2d 24. This case more properly falls within the province of the Accident and Health Insurance Committee, inasmuch as suit was brought by the Mutual Benefit Health and Accident Association which had issued a policy insuring against loss of life, limb, sight or time resulting directly and independently of all other causes from bodily injuries sustained through purely accidental means. No life insurance policy was involved. However, the case is of interest to the Life Insurance Committee because of its probable applicability to double indemnity cases. The assured, age 77, sustained a broken knee and bruises of the right arm, shoulder and chest in an auto-

mobile accident on January 20, 1952. On January 21st he was taken to a hospital where he died January 24th, the attending physician giving the cause of death as "cerebral hemorrhage." The company denied that the death was accidental within the meaning of the policy and filed application for an order for disinterment for the purpose of holding an autopsy. (Under Iowa Code Sections 141.22 to 141.25). The trial court relied on testimony of a pathologist that it was reasonably probable that an autopsy would disclose the condition that caused decedent's cerebral hemorrhage and granted the application. The Supreme Court affirmed a finding that there was reasonable likelihood an autopsy would determine the cause of death and thereby confirm or negative the respective claims of the litigants. The court refused to say that the company was guilty of unreasonable delay in waiting until July 8th to file its application. It should be noted that the Iowa statute gives no time limit for filing such an application. The court permitted "shaving or such slivers of tissue as may be necessary to subject to microscopic examination," to be permanently removed from the body, but required all other parts to be restored to their normal place in the body prior to reburial.

Group Life Insurance

Commercial Insurance Company of Newark v. Burnquist, 15 L. C. 508; 105 Fed. Supp. 920 (U. S. Dist. Ct., Iowa 6/30/52).

This case is also more properly within the field of Accident and Health Insurance Committee, inasmuch as it deals with a claim brought by an Iowa lawyer under a group health and accident policy issued to the Iowa State Bar Association. However, the opinion also contains a discussion of group life insurance, which was first authorized in Iowa in 1919 and the holding is applicable to life insurance. The defendant Burnquist filled out and mailed to the plaintiff company on or before August 11, 1950, an enrollment card containing the following provisions:

> "It is hereby understood and agreed that unless the applicant . . . is on active full time duty on the effective date of the certificate, the insurance hereby applied for shall not become effective until the applicant resumes active full time duty."

The defendant discovered he had incipient pulmonary tuberculosis during the week of September 11, 1950, but continued to work part-time until September 25, 1950, when he began a period of hospitalization which ended October 11, 1951. The effective date of the master policy was October 1, 1950. Defendant paid his first semi-annual premium September 30, 1950, and two additional premiums were accepted by the company although they knew of the defendant's disability as early as November, 1950. Relying on the quoted condition in the enrollment card, the company filed a complaint for declaratory relief, asking the U. S. District Court to construe the policy and declare it ineffective until the date when defendant returned to active full time duty as a lawyer. The court rejected the defendant's contention that the enrollment card was not a part of the contract of insurance, but held that by accepting and retaining premiums with full knowledge of the facts of disability, the company elected to treat the policy as covering the defendant. The company's affirming of its right to the premiums by their acceptance and retention was fundamentally inconsistent with its denial of coverage based on the active full time duty condition in the enrollment card.

Increase in Maximum Amount

The Pennsylvania Legislature on June 11, 1953 approved a statute increasing group life insurance limits to $20,000 or one and one-half times the basic annual earned income, whichever is greater but in no case exceeding $40,000. This act will be effective upon signature of the Governor. (Act. No. 29 of 1953).

Reinstatement—Insurability

In *Hogan v. John Hancock Life,* 195 Fed. (2d) 834, 15 L. C. 365, the insurer was permitted to require as a condition for the reinstatement of a lapsed policy that the insured be in sound health on the date the application was approved and that he had not consulted or been treated by a physician between the signing and the approval of the application. This requirement was permitted although the policy itself conditioned reinstatement only upon "evidence of insurability satisfactory to the Company."

Divorce—Irrevocable Beneficiary

Hundertmark v. Hundertmark, 93 A. (2d) 856, 15 L. C. 724, was an interpleader proceeding between a divorced wife and a widow. The former had made a separation agreement with the insured that her designation as beneficiary should be made irrevocable unless the parties were divorced and the wife remarried. After a marriage of twenty-three years, the couple were divorced, the husband remarried two years before his death, and only one month before his death named his second wife as beneficiary. The insurance company had never been informed of the separation agreement, and the first wife had never remarried. The Supreme Court awarded the insurance proceeds to the first wife as an irrevocable beneficiary for value whereas the widow was considered only a volunteer.

Policy Loan—Not a Debt

The Pennsylvania Supreme Court only recently ruled that an insurance policy ban does not create a debtor-creditor relationship and the beneficiary is entitled only to the net proceeds of the policy without reimbursement from the decedent's estate for the amount of the policy loan. See In re *Schwartz,* 87 A. (2d) 270, 15 L. C. 270.

Disability—Life and Accident Policy—Age of Insured and Fact of Total Disability

Lavenstein v. Travelers, 93 A. 2nd, 745 (Md. 1953) was a suit to reform a life and accident policy so that the policy would show that the insured was born a year later than the date shown in the policy and so make him eligible for total and permanent disability benefits. The testimony showed that the insured had stated his date of birth as February 13, 1891 (the date used in the instant case) in applying for several policies of insurance over a ten year period, when examined by physicians on two occasions and when he took out naturalization papers. On the other hand, when registering as a voter, when obtaining a driver's license, and when registering at his draft board, the insured stated his date of birth to be February 13, 1892. The court held that the burden of proof was on the insured, that his use of conflicting dates over the years merely indicated that he did not know his own age and that he had not met the burden. The court held that the usual "misstatement of age" provision which was included in the policy did not shift the burden of proof.

The court also held that the insured, who continued to do what he had done in his business for several years, could not be considered totally disabled within the meaning of a life policy even though his physician considered him totally disabled and strongly urged that he cease all activity.

Felonious Killing of Insured by Beneficiary

Burns v. United States, 103 Fed. Supp., 690 (D. C. Md. 1952), was an interpleader action to determine whether a widow, the principal beneficiary, or a daughter, the contingent beneficiary, under a National Service Life policy was entitled to the proceeds of insurance. The widow had shot and killed the insured. She was tried in the state courts and acquitted. The trial court held that the acquittal was not *res adjudicata* in the civil action. On the testimony the court held that the widow had intentionally killed the insured, was not justified in doing so on the theory of self-defense and was, therefore, precluded from recovering under the policy. The decision was affirmed by the Court of Appeals in a *per curiam* opinion reported at 200 Fed. 2nd, 106.

Forfeiture—Waivable Premiums Should be Offset to Prevent

In *Morrell v. United States,* 107 Fed. Supp. 658 (D. C. Md. 1952), the court held that the Veterans Administration must set off refundable premiums due an insured because of his total disability against other premiums it claimed to be due so as to prevent a lapse. The court said it was applying the same principle applicable to a private insured company, that an insurer must not declare a forfeiture for non-payment of premiums at a time when the insurer is indebted to the insured for dividends declared or otherwise. In this case the Veterans Administration determined, four years after death, that the insured had been totally disabled (and consequently entitled to have his premiums waived) for a period of over one year during which he was paying premiums. The court held that the premiums so paid should have been set off against premiums subsequently becoming due after the disability terminated so as to prevent a lapse.

New Legislation

Iowa

Senate File 159. This amends Section 508.28 of the Code of 1950 so as to permit the issuance of life policies without medical examination in the amount of $10,000 rather than $5,000 as previously permitted. The following provision was also added to Section 508.28:

"and additional insurance without medical examination may be issued in an amount not to exceed $10,000 subsequent to the issuance of any policy on said life after medical examination."

House File 390. Permits the issuance of life, accident and sickness insurance policies on a franchise plan at reduced rates covering the members of an association. An "association" is defined as a labor union, trade association, association of employees, industrial association or professional association, which has been organized and operating more than two (2) years for purposes other than procuring insurance. A "franchise plan" is defined as an insurance policy or policies covering at least 50% of the insurable members of an association, but in no case less than ten (10). Policies may be written in the name of the association or may be written individually for the insured members subject to certain limitations.

Senate File 131. Provides that no life insurance company shall invest from its surplus, in common stocks, more than an amount equal to 5% of its funds.

Maryland

In addition to increasing the compensation of the Insurance Commissioner the Maryland Legislature, at its 1953 session, enacted several laws of interest to members of the Association.

Chapter 523 of the 1953 laws requires a life, accident or health insurer to state fully, upon written request of the claimant, its reasons for denying a claim. The act provides, however, that the stated reason shall not act as an *estoppel* or limit the insured from offering additional reasons for the denial.

Chapter 537 authorizes the Insurance Commissioner, after notice and hearing, to revoke the certificate of authority to do business of any foreign or alien stock insurance company, mutual insurance, company, reciprocal exchange or inter-insured, Lloyds or a fraternal beneficiary association if he finds that the insurer has failed to comply with any requirement imposed on it by law and revocation is reasonably necessary to protect the interests of the people of the state. Judicial review of the commissioner's action is provided for. The Commissioner may, upon cause shown, reinstate any certificate of authority previously revoked by him.

Chapter 538 increases the required broker's bond to $2,500.00.

Tennessee

Chapter No. 181, Tennessee Public Acts of 1953, amends the Standard Provisions Statute, Section 6179 Subs. 3, Supplement to the Code of Tennessee by deleting:

"and shall be incontestable after two years from its date,"

and substituting therefor the following:

"and shall be incontestable after it shall have been in force during the lifetime of the insured, for a specified period, not more than two years from its date."

Your Committee hopes this reporting will be of interest and assistance to our Association Membership.

Respectfully submitted,

T. DEWITT DODSON, *Chairman*
ROBERT P. HOBSON, *Vice Chairman*
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Report of Malpractice Committee

YOUR Committee undertook for the 1953 Report a survey of the cases determined within the past year on the law of malpractice. The cases considered pertain to malpractice actions against physicians and surgeons, hospitals, and attorneys. This Report carries out the policies set by the Malpractice Committee in its two previous Reports to this Association. For the purposes of convenience, the Report is broken down to the various jurisdictions covered by the Reporter System. As was pointed out in the Report of the Malpractice Committee of 1952, there are no doubt many interesting decisions in trial courts upon the subject of malpractice that would be of significance to members of this Association. This material being unavailable without attention to the same being called to the Committee, it is urged by the Committee that the members of the organization could readily be of assistance to the Malpractice Committee by reporting on any such significant decisions of the trial courts. The Committee welcomes any assistance from its membership along these lines; and, further, any comment from the membership correcting or supplementing the information contained in this Report would be greatly appreciated.

Federal Reporter System

(Contributed by Charles P. Gould of the firm of Spray, Gould & Bowers, Los Angeles, California)

There is one case on alleged malpractice of an attorney, *Mathein v. Seawell*, 199 F. 2d 953. Suit was brought by a client against her attorney in which the plaintiff alleged that the attorney representing her in a divorce action was guilty of negligence in allowing a judgment to be entered against her. The judgment was entered when the attorney was engaged in another court, and after he had secured from opposing counsel consent that the trial of the divorce action be continued, upon motion by the attorney the judgment was set aside and the divorce case subsequently non-suited. Judgment in favor of the defendant on the malpractice action was affirmed, it being held that there was no evidence that the attorney was guilty of negligence or that the plaintiff had sustained any damages.

On the question of malpractice on the part of a hospital, there is one reported case, *United States v. Gray*, 199 F. 2d 239. The action was instituted under the Federal Tort Claims Act to recover damages for personal injuries. The plaintiff was a patient in an army hospital. She occupied a room on the second floor of the hospital. Her condition had been diagnosed as neurotic and she had manifested suicidal thoughts. A guard was placed at her door with instructions to watch her constantly. A window in her room was opened for ventilation purposes and nothing was done to make it secure. While no members of the hospital personnel were present in the room, the plaintiff jumped or fell from the window to the ground outside, sustaining the injuries complained of. Judgment in the trial court was rendered for the plaintiff, and the Government appealed.

Upon appeal, it was held that the hospital was negligent in failing to exercise ordinary care for the welfare of the patients, which measure of care was determinable by reference to the facts of the particular case. Here the hospital had knowledge of the disrupted mental condition of the patient and her tendency to a self infliction of harm. By failing to maintain a constant watch over the patient, there was negligence on the part of the agents and employees of the Government. The matter was reversed for the reason that the judgment included damages for loss of earnings, and there was an absence of evidence of earning capacity.

The action *Goodwin v. Hertzberg*, 201 F. 2d 204, is one for malpractice brought against a physician resulting from surgical error. Following the trial, the jury disagreed and was discharged. The Court refused to grant a new trial and directed judgment for the physician. The Court of Appeals held that the plaintiff should have been granted a new trial and remanded the case for that purpose. In performing an operation on the plaintiff, the physician had perforated the patient's uretha. No expert witnesses were called to testify. The doctor admitted on the witness stand that he must have made the opening himself in the uretha in the process of the operation. The Court held that the case

should have been submitted to the jury upon the evidence. That it was not necessary to have direct and positive testimony of specific acts of negligence in a malpractice action, and further that the facts alone in a malpractice action may be sufficient to prove negligence, and, if so, it is unnecessary to have expert witnesses.

Graham v. Alcoa S. S. Co., 201 F. 2d 423, is a seaman's action at law for the alleged negligent failure of the defendant to provide an operation to correct a ventral hernia. The defense showed that the physician employee of the defendant had examined the plaintiff during the course of his employment and had found a bulging and protruding area in his abdomen. Thereafter the plaintiff had returned to sea, but was unable to do his usual work. At the trial a medical witness testified on behalf of the plaintiff that the language of the defendant's physician's report at the time of his examination indicated that the plaintiff was suffering from a hernia and that the plaintiff should then have been advised to have it repaired by surgery. The District Court dismissed the case when the plaintiff's case evidence was in, and the Court of Appeals sustained the dismissal holding that the evidence was insufficient to have been submitted to the jury. The decision held that there was no evidence of negligence, it was simply a difference of opinion between two doctors as to whether it would be advisable to have an operation. It was held that competent surgical men could reasonably differ on such an issue, and that the evidence showed only of failure to agree, not that he who disagreed was negligent. Such a disagreement was not an issue for a lay jury to resolve. If competent medical men can reasonably differ as to the proper course to pursue, a doctor is not negligent in pursuing one of them, though others in the profession may believe another course would have produced better results.

Atlantic Reporter

(Contributed by William T. Campbell of the firm of Swartz, Campbell & Henry, Philadelphia, Pennsylvania)

HOSPITALS

No malpractice cases against hospitals.

PHYSICIANS AND SURGEONS

Carbone v. Warburton, 91 Atl. 2d 518 (N. J.)

In a malpractice action against a New Jersey doctor for alleged negligent treatment of a broken leg, the testimony of an 82-year-old specialist in gynecology, who was licensed to practice in New York and who had performed no operations for 20 years, but who had observed operations 10 to 15 times a year during that time and had kept abreast of medical and surgical process by reading, was held competent to testify as an expert witness for the plaintiff.

ATTORNEYS

No actions for damages against attorneys were reported.

Northeastern Reporter

(Contributed by Wayne E. Stichter of the firm of Effler, Eastman, Stichter and Smith, Toledo, Ohio for the states of Massachusetts, New York and Ohio)

AS TO PHYSICIANS

Thomas v. Ellis, 106 NE 2d 687 (Supreme Judicial Court of Massachusetts, 1952), was an action against an obstetrician for negligent treatment resulting in the still-birth of plaintiff's baby. Defendant's motion for a directed verdict was overruled and there was a verdict and judgment in favor of the plaintiff.

On appeal, the judgment was affirmed on the ground that there had been sufficient evidence at the trial of the case to justify a finding that on a date about four weeks before the plaintiff's expected confinement the defendant performed a version upon her and told her to expect her baby at any time; that defendant believed that the version was dangerous and could result in a separated placenta; and that defendant did not visit plaintiff until seven hours after he was notified of her symptoms of separated placenta. The court further found that the jury was justified in finding that a Caesarean operation should have been performed and the uterus emptied as soon as possible after notice of plaintiff's symptoms, and that defendant's failure to do so was a failure to exercise the care and skill required of him as an obstetrician.

Bridgewater v. Boyles, 107 N E 2d 641 (Ohio App. 1951), was an action against a dentist for expenses incurred by plaintiff as a result of negligent extractions performed upon plaintiff's wife. The evidence showed that the defendant had been em-

ployed to extract twenty teeth from plaintiff's wife and that during the operation one or more teeth were broken from their roots and the roots allowed to remain in the patient's jaw. It was also shown that after the extractions the patient suffered much pain, suffered from convulsions, required the attention of a physician, underwent further dental extractions, one of which required hospitalization, and was confined to her home by her illness for more than a year. The trial resulted in a verdict and judgment for the plaintiff, but defendant's motion for a new trial was sustained on the ground, *inter alia*, that the verdict was not supported by the evidence.

On appeal, the court held that the expert testimony introduced in behalf of plaintiff was sufficient to prove that the illness caused by the presence of the tooth root was the proximate result of the defendant's failure to remove it. The granting of the motion for a new trial was sustained, however, subject to a *remittitur* on the ground that the verdict was in excess of the damages pleaded.

In *Blackman v. Zeligs*, 103 NE 2d 13 (Ohio App. 1951), the defendant, an orthopedic surgeon, had been employed by plaintiff's decedent to perform an operation upon her. The hospital in which the operation took place was chosen by the patient on the recommendation of her family physician. The patient was prepared for operation by the hospital employees and during the course of the preparation the patient sustained burns as a result of the application of benzine. In an action for damages sustained as a result of the burns, there was a directed verdict for defendant. The plaintiff appealed on the grounds that the facts required the application of the doctrine of *res ipsa loquitur*, or at least a submission of the facts to the jury.

The Court of Appeals held that since the defendant had not had exclusive control of the agency that caused the injury, the doctrine of *res ipsa loquitur* could not be applied. The court further held that there was no issue of negligence for the jury. If the application of benzine to the body of the patient was an act of negligence, it was negligence on the part of the hospital employees and could not be attributed to the defendant surgeon.

(No New York cases worthy of note).

AS TO HOSPITALS

Roth v. Beth El Hospital, 110 NYS 2d 583 (Sup. Ct., App. Div. 1952). Plaintiffs brought an action against the defendant hospital for damages for negligent medical treatment by one of its internes. There was a judgment for defendant hospital and plaintiffs appealed.

Although the appellate court was of the opinion that there was sufficient evidence to constitute a *prima facie* case of malpractice on the part of the interne, the judgment of the lower court in favor of the hospital was affirmed on the ground that the hospital was not liable for the negligent performance of a *medical* act.

In *Bryant v. Presbyterian Hospital in City of New York*, 110 NE 2d 391 (Ct. of App. of N. Y., 1953), the plaintiff brought an action against defendant hospital for injuries received as a result of the negligent administration of a hypodermic injection by one of the hospital's nurses. At the close of plaintiff's case the complaint was dismissed and plaintiff appealed.

The court of appeals, in affirming the judgment for defendant, stated that the injection of medication by hypodermic was a *medical* act. The court then adhered to the New York rule by holding that the defendant hospital could be liable for the negligent performance of a medical act of its employee only if it had been negligent in the selection of the employee. In reviewing the evidence, the court held that the plaintiff had failed to positively identify the nurse who had administered the injection, and that as a consequence there was no proof of negligence in her selection.

O'Rourke v. Halycon Rest, 118 NYS 2d 693 (App. Div. 1953), is another case in which a hospital was held not liable for the negligent performance of a medical act where there was no proof of negligence in the selection of the employee. In this case the plaintiff was under the care of a physician who had no connection with defendant hospital. The physician recommended electro-shock therapy and it was arranged that defendant hospital would furnish the facilities and a staff physician to administer the treatment. In an action for injuries received during the course of the therapy, there was a judgment for plaintiff against the defendant hospital.

On appeal, the judgment was reversed and the complaint dismissed. The court held that, even assuming the negligence of the staff physician, the hospital could

not be held liable in the absence of a showing that the staff physician was not a suitable person to administer the therapy. The court was also influenced by the fact that the therapy was prescribed by plaintiff's own physician and that there was no contract between the hospital and the plaintiff.

In *Pivar v. Manhattan General, Inc.*, 110 NYS 2d 786 (App. Div. 1952), however, a hospital was held liable for the negligence of its employee in the performance of an *administrative,* rather than a medical, act. In an action for injuries sustained in falling from a hospital bed, the issue before the Supreme Court was whether the installation of sideboards was a medical or an administrative act. The court cited and followed other New York cases in which it was held that the decision as to whether sideboards are needed is a medical act, but that once they are ordered the installation of sideboards is an administrative act. The court further stated that the negligent omission to perform such an administrative act was binding on the hospital, regardless of its status as a charitable institution.

In *Murray v. St. Mary's Hospital,* 113 NYS 2d 104 (App. Div. 1952), the defendant hospital was held liable for the death of a patient suffering from postpartum psychosis following the delivery of a child. Contrary to the instruction of the patient's physician, the hospital employees did not advise him of her condition, and during one of her psychotic spells the patient committed suicide by jumping from a window.

The Supreme Court of New York reversed a judgment for defendant hospital that had been rendered at the close of plaintiff's case, and the case was remanded for a new trial. The court was of the opinion that under the circumstances the hospital was under a duty to use reasonable care to prevent the patient from injuring herself, and that the question of negligence should have been submitted to the jury. Although the court did not discuss the case in terms of medical or administrative act, it would seem that the court assumed that the failure to advise the physician of the patient's condition, after being instructed to do so, was the omission of an administrative act.

St. George v. State, 118 NYS 2d 596 (Ct. of Claims 1953). An inmate of a New York prison was committed to an institution for the criminally insane because he was considered too dangerous to be kept in the penal institution. He was subsequently discharged as recovered and four days later, he stabbed seven persons, none of whom he had ever seen before. Of the seven persons stabbed, four were killed including plaintiff's decedent. At the trial of the case against the State for the negligent treatment and discharge of the patient, the evidence showed that an improper diagnosis of the patient's condition had been made and that proper treatment had never been rendered. In holding the State liable for the death of plaintiff's decedent, the court stated that the improper diagnosis and treatment of the patient and his premature discharge were the results of the overcrowding of the state institutions and the inadequacy of supervisory personnel. The court further stated that the State, having assumed to treat a mental incompetent confined to its care, was obliged to exercise a reasonable degree of care in the treatment and psychiatric evaluation of the patient. Here again the court did not speak in terms of medical or administrative acts but based its decision on the failure of the State to institute and carry out the procedure dictated by accepted psychiatric practice.

(No Massachusetts or Ohio cases worthy of note).

AS TO ATTORNEYS

In Re Ruby, 105 NE 2d 234 (Supreme Judicial Court of Mass., 1952). In a disbarment proceeding heard by a single justice of the Supreme Court of Massachusetts there was evidence that the defendant, a judge, had invited a bribe from a person whose case was to be heard in the defendant's court. The single justice ordered the defendant removed from his office of attorney at law, and the defendant excepted on the grounds that the evidence did not warrant such a finding and that the result reached upon the findings was an error of law.

On appeal before the full court, it was held that in a proceeding for disbarment the proof need not be beyond a reasonable doubt as in criminal cases and that the evidence against the defendant had been sufficient to justify a finding by the single justice that the defendant had invited a bribe. The court further held, on the basis of prior Massachusetts decisions, that the disbarment of a lawyer who had been

found guilty of requesting a bribe was not an error of law.

In Re *Foote,* 118 NYS 2d 627 (App. Div. 1953). In this case an attorney had been charged with neglect of his client's interests in that he permitted her action for personal injuries to be dismissed for failure to appear at the class of the pre-trial calendar. It was further charged that the attorney took no steps to have the action restored and kept himself unavailable to his client.

The attorney failed to file an answer to the charges preferred by the Association of the Bar, and although duly served he did not appear before the referee at any time. The court held that on these facts the attorney would be indefinitely suspended but gave him leave to apply for reinstatement after six months because of mitigating circumstances concerning his health.

(No Ohio cases worthy of note).

(Contributed by L. Duncan Lloyd of Lord, Bissell and Kadyk, Chicago, Illinois for the states of Illinois and Indiana)

ILLINOIS

A. Hospital—None.

B. Legal.

Jones v. Hodges (1952 3rd Dist.) 347 Ill. App. 436 (Abst. Decision).

Evidence warranted judgment in favor of attorney for fees as against client's contentions of negligence, lack of diligence or breach of terms of contract by attorney.

The court said:

> "The evidence in the case does not support the charges made in his complaint as to negligence, lack of diligence or breach of the terms of the contract. On the contrary, the Circuit Court was adequately justified in finding that defendant Hodges had brought into the conduct of his client's business the legal knowledge and skill common to members of the legal profession, had acted toward his client in good faith and fidelity, and had exercised in the course of his employment with the plaintiff the reasonable care and diligence usually exercised in such cases."

C. Medical.

Smith v. Dept. of Reg. & Education (1952) 412 Ill. 332; 106 NE 2d 722.

In an action to revoke the license of a physician to practice medicine in the State of Illinois for malpractice in the treatment and cure of cancer, the Illinois Supreme Court reversed the judgment of the trial court revoking the license on the ground that the findings to support the revocation of a medical license must be based on evidence heard by the administrative tribunal, with opportunity to cross-examine witnesses, inspect documents and offer evidence in explanation or rebuttal and the administrative tribunal cannot rely upon its own information even though it is composed of experts, in the absence of any expert testimony relating to the physician's professional conduct or to the value of his diagnosis or treatment and that findings of malpractice can be sustained only on specific charges where the proof is clear and convincing.

INDIANA

A. Hospital—None.

B. Legal—None.

C. Medical.

Worster v. Caylor (1952 Ind. App.) 106 NE 2d 108.

Action for alleged malpractice in negligently cutting the plaintiff's bowel in the performance of an operation to correct an incisional hernia. The trial court entered a judgment for the defendant at the close of the plaintiff's evidence. On appeal the court reversed holding that as the facts brought the case within the category of cases where an unusual injury occurs within the actual field of surgery or treatment to healthy and unaffected portions of the patient's body not intended to be affected by the surgery or treatment, and as the patient was under anesthetic and unconscious at the time his bowel was cut, the doctrine of *res ipsa loquitur* applied.

Fabian v. Goldstone (1952 Ind. App.) 103 NE 2d 920.

Action for damages for malpractice by defendant doctors in treatment of the plaintiff for overweight condition. The jury found for the defendants. The court affirmed holding that the comment by the trial judge when overruling the objection to plaintiff's medical witness that he was going to overrule objection on the theory that the witness had stated his degree of knowledge which would make it appear as of some value, and that he was going to let the jury determine what testimony was worth, although he thought better rule might be that such type of witness should be member of profession in all respects at time he gained knowledge to which he

testified, was not improper as comment on weight of evidence. Justice Martin dissented.

Northwestern Reporter

(Contributed by Kenneth P. Grubb, of the firm of Quarles, Spence and Quarles, Milwaukee, Wisconsin, for the states of Michigan, Minnesota and Wisconsin)

A. ATTORNEYS

There are no cases relating to malpractice actions against attorneys in these states during the period in question.

B. PHYSICIANS AND SURGEONS

The only case which reached an appellate court during the past year involving malpractice by physicians and surgeons in Michigan, Minnesota or Wisconsin, was the Minnesota case of *Moeller et al v. Hauser*, 54 N. W. 2d 639 (Minn., 1952). Several significant issues were decided in that case with respect to the liability of a physician for malpractice. It appeared that the defendant attending physician failed to visit his patient in the hospital for a period of about nine days and that during this period a complication in the patient's leg injury developed which, according to a medical expert who testified for the plaintiff, if properly treated during that time would have prevented the damage for which the action was brought.

While the court adhered to the general rule that the negligence of the physician was a jury question and that a physician or surgeon is not an insurer of a cure but is only required to possess the skill and learning of the average member of his profession in good standing in his locality and to apply his skill and learning with due care, nevertheless the court held that an attending physician is not relieved of a duty to call on a patient merely because he is receiving care in an accredited hospital under the care of qualified resident physicians and nurses. The court held that whether a physician observed the standard of care required of him when he did not visit his patient with a leg injury for a period of about nine days was a question for the jury. The court held that the doctor's mistaken belief that the patient had been discharged from the hospital was insufficient to take from the jury the question of negligence in failure to visit the patient since it was incumbent upon the doctor to ascertain the fact of discharge. The mere fact that he had informally ordered a discharge, apparently not through proper channels, was not enough to remove this obligation.

The case seems significant insofar as it discusses and establishes the doctor's duty with regard to visiting his patients in the hospital, even though the ultimate principles upon which the court relies are old and familiar rules.

C. HOSPITALS

Moeller v. Hauser also presented issues with respect to the liability of a hospital and resident physicians for malpractice since the hospital and a resident physician were also defendants in that case. It appeared that any negligence of the defendant resident physician occurred while he was engaged in routine duties in the course of his work at the hospital, for which he was paid a salary by the hospital. The court held that at such times, as opposed to times when he assisted specific doctors in surgery, etc., he was an employee of the hospital and not an independent contractor with respect to it. His negligence was therefore imputed to the hospital under the doctrine of *respondeat superior*, it having been established in earlier Minnesota decisions that a hospital, private or charitable, is liable to a patient for the torts of its employees under that doctrine. The court rejected a doctrine accepted by some states to the effect that the relation between a hospital and its physicians is not that of master and servant while such physicians are acting in a professional capacity insofar as that doctrine was intended to be applied to resident physicians. It held that the case of a resident physician was analogous to the case of a nurse and relied on cases holding that nurses sustained the relation of employee to the hospital.

Of course the resident's negligence was a jury question.

The only other case with respect to the liability of a hospital for injury to its patients is another Minnesota case, *Sylvester v. Northwestern Hospital of Minneapolis*, 53 N. W. 2d 17 (Minn., 1952). That case was an action by a patient against the hospital for personal injuries of the patient sustained when he was struck in the abdomen next to an appendectomy incision by an intoxicated fellow patient. The court held that the question of the hospital's negligence depended upon whether it knew or should have known that a patient was

wandering about the hospital in an intoxicated condition, and that this was a jury question. The court held that a private hospital was not an insurer of the safety of a patient, that it must exercise reasonable care for the protection and well-being of a patient as his known physical and mental condition require or as required by his condition as it ought to have been known by the hospital in the exercise of ordinary care. The court pointed out that a hospital was not under a duty greater than that of reasonable care under the circumstances, one of the circumstances being the patient's inability to look after his own safety. The court held that knowledge by the hospital that the patient was possessed with vicious or aggressive tendencies when drunk was not necessary to sustain liability. The duty of the hospital to control the intoxicated person so that he did not become an unreasonable risk of harm to others arose from the fact that the agents of the hospital knew, or should have known that one of its patients was so intoxicated as to stagger when walking.

While the case is not technically a malpractice case, nevertheless it is included because it bears upon the general question of a hospital's liability to its patients for negligence.

(Contributed by George N. Mecham, of the firm Mecham, Stoehr, Moore, Mecham and Hills, Omaha, Nebraska, for the states of Iowa, Nebraska, North Dakota and South Dakota)

A. ATTORNEYS

There are no reported malpractice cases against attorneys in the state courts of these states since February 1, 1952.

B. HOSPITALS

There are no reported malpractice cases against hospitals in the state courts of these states since February 1, 1952.

C. PHYSICIANS

The only malpractice case against doctors I find reported is the following: *Stickleman v. Synhorst,* Iowa, 52 N. W. 2d 504. This case is cited on page 323 of the Insurance Counsel Journal of July 1952 in the Report of the Malpractice Committee, but there is no statement of facts or indication of the finding of the court.

The case was decided April 1, 1952. The defendants attempted to inject an oil substance directly into plaintiff's trachea with a hypodermic needle to facilitate a mapping of plaintiff's lungs. The doctor missed the trachea and evidently the needle penetrated an artery which caused such profuse and prolonged bleeding that it endangered plaintiff's life and resulted in some permanent injury. There was a directed verdict for the defendants, but on appeal the case was reversed.

Paragraph 6 of the syllabus is as follows:

> "Where patient suffered excessive bleeding following surgeon's attempt to inject oil into her trachea as part of lung mapping procedure, surgeon's statements about the 'mess I made out of you' and about not charging for lung mapping, were in nature of admissions which aided patient's case against surgeon and not mere expressions of regret or sympathy."

Paragraph 10 of the syllabus is as follows:

> "In malpractice action against surgeon, ordinarily evidence of requisite skill and care to be exercised by surgeon must come from experts, but exceptions to rule exist where surgeon's lack of care is so obvious as to be within comprehension of laymen and to require only common knowledge and experience to understand, and where surgeon injures part of body not under treatment."

Pacific Reporter

(Contributed by Rex J. Hanson, of the firm of Stewart, Cannon and Hanson, Salt Lake City, Utah)

MALPRACTICE CASES AGAINST DENTISTS

Wintersteen v. Semler, 250 P2 420 (Ore).

Plaintiff suffered from pyorrhea over a number of years. On July 10, 1948, she went to defendant's office to have her remaining teeth extracted. After the oral surgery, plaintiff was taken to a recovery room. Her husband testified that she was lying on her back with her head tilted to the right. Plaintiff regained consciousness in about five minutes. That evening she commenced having violent coughing spells and vomiting. She returned to the defendant's office later for examination and defendant told her everything was fine. One week later, she returned to the office to have the sutures removed. She reported coughing symptoms to the nurse and was informed that that was the natural thing after extractions. About three months

later, she underwent an operation for the removal of abscesses on both lungs. Plaintiff introduced the testimony of two experts: a dentist who testified in her behalf stated that plaintiff should not have been placed in a horizontal position on her back; her physician testified that the probabilities were that the abscesses were caused by the aspiration of foreign material during or shortly after the extraction.

The lower court entered judgment on the verdict for plaintiff. The reviewing court found in analyzing the physician's testimony that the following inferences must be indulged in order to sustain the verdict:

1. That foreign matter got into plaintiff's trachea;
2. That such matter proceeded to plaintiff's lungs;
3. That such matter was infectious; and
4. That such infectious material caused the abscesses.

The court held that such testimony was merely an inference upon an inference and would not therefore establish any proximate causation between the defendant's negligence, if any, and plaintiff's subsequent illness.

The court reversed and instructed that judgment be entered for the defendant.

MALPRACTICE CASES AGAINST HOSPITAL

Milias v. Wheeler Hospital, 241 P2 684 (Cal.)

The infant plaintiff in this action was admitted to the defendant hospital for treatment for blood poisoning and osteomyelitis. No contention was made at the trial that the diagnosis was incorrect or that the treatment prescribed was in error, part of which treatment consisted of the application of heat to the plaintiff's leg. During the course of the treatment, infant plaintiff received third degree burns of the leg, resulting in scarring. There was medical evidence that the illness could have caused the scarring or it could have been caused by the heat. There was also evidence that in her ill condition the plaintiff could not tolerate the amount of heat necessary to cure the illness. The court properly instructed on the elements of *res ipsa loquitur,* but under a separate instruction clearly left it to the jury to determine whether the evidence had established sufficient facts upon which to apply the doctrine. The jury returned a verdict for the defendant. Plaintiff contended on appeal that the instruction was erroneous in that the jury should not have the power to apply or disregard the doctrine of *res ipsa loquitur.* The reviewing court in affirming the trial court said:

> "There are many cases, such as the instant one, where the existence or nonexistence of the conditions giving rise to the doctrine are questions of fact which must be decided by the jury before the doctrine is applicable at all."

Talley et al v. Northern San Diego County Hospital Dist. (Cal.), 246 P2 970.

Plaintiff was admitted to the defendant hospital as a paying patron. Upon regaining consciousness after the administering of anesthetic, she discovered her legs had been seriously burned, which she contended resulted from the negligence of the hospital employees in placing hot water bottles or other hot substances against the part of her anatomy affected. The court held that the doctrine of *res ipsa loquitur* applied to the fact situation but absolved the hospital of liability upon the grounds that it was an instrumentality of the state engaged in a government function, as distinguished from a proprietary function; that the acceptance of fees by a public hospital operated by and organized under state law did not constitute such operation a proprietary function.

Farber v. Olkon et al, (Cal.) 246 P2 710.

Plaintiff, a mental incompetent, brought suit by his guardian against the defendant and others operating a neurological institute, for damages resulting from the alleged administration of shock treatment, resulting in broken femur bone in each leg. The plaintiff appealed from a directed verdict in favor of the defendants. In affirming the verdict, the Appellate Court held that the trial court correctly refused to apply the doctrine of *res ipsa loquitur;* that the doctrine was limited to those situations "where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."

MALPRACTICE CASES AGAINST PHYSICIANS

Pearce v. Linde et al (Cal.) 248 P2 506.

Plaintiff filed suit against the defendant

physicians and the Franklin Hospital for injuries allegedly resulting from the failure of defendant physicians to take x-rays in the course of treating his left foot, which involved surgical operations. The trial court granted non-suits against the plaintiff in favor of all the defendants, from which plaintiff appealed but subsequently abandoned the part of his appeal against the hospital. The only question considered by the Appellate Court was whether the trial judge had erred in refusing to accept as an expert a medical witness called by the plaintiff. This doctor was licensed to practice in Nevada and was a specialist in internal medicine. He had no experience in orthopedics or in any other branch of surgery. Since the question involved was whether the defendants had used proper skill and care in performing operations on plaintiff's foot, the court held that the testimony of an expert of internal medicine would be no more persuasive than that of a layman who had read and heard what was proper professional practice.

Dodson v. Pohle et al (Ariz.), 239 P2 591.

In an action against a physician for negligence in causing facial burns on a baby while treating her in an oxygen tent with a vaporizer for bronchial ailments, the Appeal Court reversed the trial court which had directed a verdict in favor of the defendants upon the ground that the doctrine of *res ipsa loquitur* applied, which required the submission of the issue of negligence to a jury. In its opinion, the court reaffirmed the earlier decisions, held that the doctrine of *res ipsa loquitur* did not apply in the ordinary malpractice case but distinguished the situation in this case because the evidence showed that the oxygen tent and vaporizer were within the exclusive control of the physician and his servants at the time the burns were inflicted. The accident was of a kind which ordinarily would not occur in the absence of negligence and the injuries were to an undiseased portion of the child's body.

MISCELLANEOUS MALPRACTICE CASES

Cummings v. Donnelly (Kan.), 249 P2 695.

Held: A petition which alleged the defendant orthopedic physician who had prescribed for plaintiff an operation for removal of a diseased gall bladder, had been unable to find the gall bladder but that thereafter the diseased gall bladder burst and had to be removed by another physician, but which failed to allege that defendant did not use ordinary care and skill or that he was negligent, failed to state a cause of action for malpractice.

Duprey v. Shane et al, (Cal.) 241 P2 78.

Plaintiff was employed by defendant as a practical nurse in defendant's chiropractic clinic. While administering therapy to the patient, the patient rolled off the table and plaintiff grabbed him to break the fall. She was pulled across the table with a "terrific yank" to her shoulder. She later complained of pain and was treated by the defendant. Her condition grew worse. X-rays subsequently taken showed a dislocated vertebrae and epidural bleeding. Medical opinion at trial was to the effect that the injury did not result in the subsequent physical condition and that the subsequent injury had been caused by the vigorous manipulation treatment administered by the defendant which, according to the medical experts, was "bad practice." The jury returned a verdict of $19,572.40. Defendant's main contention was that the court was without jurisdiction on the ground that the injury occurred within the course of plaintiff's employment.

Held: When the defendant undertook to treat plaintiff, the relationship of employer and employee ended and the defendant assumed the same responsibility as he would if he were called into the case. The judgment was affirmed.

Southeastern Reporter

(Contributed by Robert R. Parrish, of the firm Parrish, Butcher, and Parrish, Richmond, Virginia)

A. MALPRACTICE CASES AGAINST LAWYERS

Glenn v. Haynes, 192 Va. 574, 66 S. E. 2d 509.

Plaintiff instituted action in detinue to recover jewelry which had been delivered to defendant as attorney for plaintiff, and which had been stolen from defendant's safe. The lower court sustained defendant's motion to strike plaintiff's evidence and plaintiff brought error.

Held: That a *prima facie* case was established when evidence showed plaintiff's title and right to possession, and delivery to defendant for plaintiff's account, and failure of defendant to return it to plaintiff on demand. An attorney, like other

trustees, is liable for loss of client's money or property unless attorney exercised same caution in protecting the property that a prudent man would have exercised in regard to his own property of like character. The responsibility of attorney for loss of client's property is that of ordinary bailee. Where client established title and right to possession of jewelry, and showed delivery of jewelry to attorney for client, and failure of attorney to return it upon demand, a *prima facie* case for recovery was presented and burden shifted to attorney to show that non-delivery was not due to failure to use reasonable care for protection and safe delivery under circumstances of his engagement.

Bennett v. Bennett, ...W. Va....., 70 S. E. 2d 894.

Evidence sustained finding that wife, living in Florida, authorized her attorney to make a general appearance for purposes of moving for a continuance, in divorce proceedings brought by her husband in West Virginia. An appearance in a proceeding by an attorney will be presumed to be by authority of the party he purports to represent.

B. MALPRACTICE CASES AGAINST DOCTORS

Waynick v. Reardon, 236 N. C. 116, 72 S. E. 2d 4. Action for alleged injury caused by negligence of surgeon as agent of hospital in performing operation upon plaintiff without his permission and without use of ordinary care. Defendant's motion for judgment as of non-suit at close of all evidence was allowed, and plaintiff brought error.

Held: That whether surgeon proceeded with that degree of ordinary care required of him under the circumstances and conditions was a question of fact for the jury. In suit against surgeon and hospital for loss of legs and other injuries which allegedly resulted when surgeon performed unauthorized nerve operation and in so doing damaged arterial blood vessels to the extent that they had to be severed, whether surgeon proceeded with the degree of ordinary care required of him under the circumstances and conditions was a question of fact for the jury. In suit for malpractice, the absence of expert medical testimony, disapproving the treatment or lack of it, is not perforce fatal to the case, since there are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise. Hospitals and members of the medical profession are not guarantors of effective cures or of perfect operative results, but nevertheless, the law of negligence holds a physician or surgeon liable for an injury to a patient proximately resulting from a want of that degree of knowledge or skill ordinarily possessed by other members of his profession, or for a failure to use reasonable care and diligence in practice of his art, or for his failure to exercise his best judgment in the treatment of his patient.

Jackson v. Joyner, 236 N. C. 259, 72 S. E. 2d 589. In action for intestate's death before regaining consciousness after a tonsillectomy performed by defendant resulting in jury verdict in favor of defendant.

Held: That instructions to the jury that there was no evidence that a hospital nurse who administered the anesthetic to intestate was an employee of defendant doctor and that defendant doctor would not be responsible for such nurse's negligence were erroneous. New trial awarded. In action against surgeon for death of child before regaining consciousness after tonsillectomy performed by defendant, evidence that defendant, after demurring to child's mother's suggestion that her family physician administer anesthetic arranged for a hospital nurse to do so, was sufficient to take to jury question whether defendant had full power of control over nurse, so as to make defendant responsible for manner in which anesthetic was administered. A surgeon having full power of control over hospital nurse administering anesthetic to patient operated on by surgeon is bound to exercise such reasonable care and skill respecting administration thereof as is usually exercised by average physicians and surgeons of good standing in same community as that in which he practices.

Lawrence v. Nutter, (U. S. C. A., 4th Cir., Va., April 7, 1953). ..... Fed. (2d) ...... An interesting question of the use of text books in cross-examining medical experts was involved in this case. The District Court refused to allow plaintiff's attorney to cross-examine the defendant doctor in regard to statements in certain medical books bearing on the treatment of similar cases. The Court said:

"We need go no further in the pending case than to hold that the attention of an expert may be called in the course of cross examination to statements in conflict with his testimony contained in relevant scientific works which he recognizes as authoritative. This holding accords not only with the more liberal view taken in the recent cases, but also with the precept contained in Rule 43 (a) of the Federal Rules of Federal Procedure that the statute or rule which favors the reception of evidence should govern. In conformity with this rule our decisions recognize 'the wisdom of admitting in evidence any matter which throws light on the question in controversy leaving to the discretion of the trial judge to hold the hearing within reasonable bounds.' *United States v. 25.406 Acres of Land,* 4 Cir., 172 F. 2d 990, 995; *Mourikas v. Vardianos,* 4 Cir., 169 F. 2d 53, 59.

"In the exercise of this discretion the judge may control the use of the material taken from learned works in the cross examination of medical witnesses so as not to seem to impose a greater burden upon the profession than is recognized by the rule in Virginia that the duty imposed upon a physician or surgeon is to exercise the highest degree of diligence and skill which is common to and exercised by the average member of the profession in good standing in the same or similar localities. See *Henley v. Mason,* 143 Va. 381, 383, 384. . . ."

Case reversed and remanded for new trial.

C. MALPRACTICE CASES AGAINST HOSPITALS

Waynick v. Reardon, supra. The facts are referred to under (B) above. As to the defendant hospital, the Court held:

Where surgeon who allegedly negligently caused patient's injuries by performing unauthorized operation was at all times an agent, servant and employee of a hospital and was acting within the scope of his duty as such agent, actionable negligence, if found, was imputable to the hospital also, and both would be liable.

Southwestern Reporter

(Contributed by Gordon R. Close, of the firm Lord, Bissell and Kadyk, Chicago, Illinois, for the states of Arkansas, Kentucky and Missouri)

KENTUCKY

A. Hospital—None.

B. Legal.

Hamilton v. Hayes Freight Lines (Ky. 1952) 251 SW 2d 277.

Plaintiffs sued joint tortfeasors, one of whom was a resident and the other a non-resident. The resident tortfeasor settled with the plaintiffs prior to trial. The trial court was not informed of the settlement and both tortfeasors went to trial, the jury returning a verdict against the non-resident tortfeasor and for the resident tortfeasor. After trial the non-resident tortfeasor discovered the resident's prior settlement and then sued to set aside the judgment because of fraud. The trial court found that there has been a fraud on the court as well as on the non-resident tortfeasor.

The Court of Appeals of Kentucky affirmed holding that there was fraud on the court in that the "administration of justice contemplates an impartial court that is informed on all facts of the controversy before it," and that there was fraud on the non-resident tortfeasor in that without the resident as a party defendant there would have been diversity of citizenship to enable a transfer of the case to Federal Court by the non-resident, and also because the resident participated in the selection of the jury and may not have been careful in his choice of jurors under the circumstances.

C. Medical

Adams v. Ison, 249 SW 2 791 (Ky. 1952).

Malpractice action commenced in 1949. In 1929 surgeon had inserted a 6-inch rubber tube and failed to remove it after an operation. In 1948, patient suffered lung hemorrhage caused by the tube. The trial court sustained surgeon's demurrer to patient's plea of estoppel to surgeon's plea of limitations. The patient appealed and the Court of Appeals of Kentucky reversed holding that surgeon's alleged statement that no harm would be caused by retention of tube in lung and that tube would be absorbed into patient's body, was a misrepresentation upon which patient had a right to rely and that it constituted obstruction of malpractice prosecution which would toll limitations.

The court stated:

" . . . Since the relationship of physician and patient begets confidence and reliance a liberal attitude should be

taken in behalf of the patient. No degree of deceit or fraud by the doctor to avoid legal liability for malpractice by enabling himself to set up the shield of limitations should be permitted."

ARKANSAS

No recent malpractice decisions.

MISSOURI

No recent malpractice decisions.

(Contributed by Richard S. Gibbs of the firm Quarles, Spence and Quarles, Milwaukee, Wisconsin for the states of Tennessee, Texas and Oklahoma)

There were no significant cases in these states on malpractice law for the period covered by this report.

Southern Reporter

(Contributed by Cicero C. Sessions, of the firm Montgomery, Barnett, Brown and Sessions, New Orleans, Louisiana)

Concerning the malpractice of attorneys, there have been two cases of significance during the past year reported in the Southern Reporter. The first is: *Beasley v. Girten,* 61 So. 2d 179 decided by the Supreme Court of Florida, Division A, on October 31, 1952. This case concerned a plaintiff whose attorney failed to attend a scheduled pre-trial conference. Due to the attorney's failure to attend the pre-trial conference and his failure to notify of his inability to be present, the Circuit Court entered an order dismissing the plaintiff's lawsuit with prejudice at the plaintiff's cost. The Supreme Court of Florida held that the rule that the attorney is the litigant's agent and that his acts are those of the principle did not justify the dismissal of the plaintiff's lawsuit with prejudice because of counsel's failure to attend the pre-trial conference, holding that such dismissal would punish the litigant instead of the attorney. The Court did suggest, however, that the attorney's action was contrary to good order and that the Court unquestionably has the power to discipline counsel for refusal or failure to attend a duly ordered pre-trial conference.

The other case of some significance is the case of *Louisiana State Bar Association v. Theard,* 62 So. 2d 501 decided by the Supreme Court of Louisiana on December 15, 1952 rehearing denied January 12, 1953. This case involves disbarment proceedings filed by the Louisiana State Bar Association against the defendant. The defendant filed exceptions of no right and no cause of action. These exceptions were overruled. It is important to note, since the case was being heard on the exceptions which were overruled, it will be heard later on the merits. However, the opinion overruling the exceptions is fairly lengthy and does set out important statements. The primary charge against the defendant is that he forged, with an attempt to defraud, certain signatures on a promissory note while engaged in the practice of law. The exceptions were aimed at the lack of authority of the Louisiana State Bar Association to institute these proceedings and, further, that the cause of action by the Bar Association had prescribed. Defendant further alleged that the acts were committed while he was incapable of discerning between right and wrong. The Supreme Court held that the Bar Association did have the right to institute the disbarment proceedings, that prescription did not bar their actions and that insanity, while a defense to a criminal charge, is not a defense to disbarment proceedings. On this last point the Court cited the Supreme Court of Illinois in the case in re: *Patlak,* 368 Ill. 547, 15 NE 2d 309, at 312, 116 ALR 627:

> "While insanity proved is a defense to a criminal charge, yet a disbarment proceeding is for more than the single purpose of punishment. There is also the even more important purpose of protecting the public from unscrupulous and dishonest lawyers. Though a man be shown to be insane, the public has a right to protection against his activities in the practice of law, particularly when the symptoms of his insanity include a penchant for keeping the money of others without rendering services or account therefor."

There were no cases during the year concerning the malpractice of hospitals, although some allusion to this was made in the two cases involving physicians and surgeons which are discussed below. There were two significant cases involving the malpractice of physicians and surgeons in the States within the ambit of the Southern Reporter. The first is the case of *Watterson v. Conwell,* 61 So. 2d 69, decided by the Supreme Court of Alabama on November 20, 1952. This case concerned a

surgeon who was sued by a patient alleging his negligence in applying a plaster cast to her leg. The principal contention of the plaintiff was that the surgeon had been negligent in allowing a colored orderly to finish the wrapping of the cast to her leg. The trial court found that the evidence was not sufficient to allow the case to go to the jury on the question of the negligence of the defendant. The Supreme Court affirmed, setting out the well settled rule that a physician or surgeon is charged only with exercising the care and skill of physician and surgeon in the same general neighborhood pursuing the same general line of practice. They also concluded that a showing of an unfortunate result does not raise an inference of culpability, and further found that simply because of the unsuccessful or unfortunate result of the treatment the doctrine of *res ipsa loquitur* does not apply. It might be noted in this case that some reference was made to the negligence of the hospital based upon the fact that the plaintiff contracted pleurisy while confined there, but this is not discussed at length and apparently there was little evidence to sustain this claim by the plaintiff.

The other case involving malpractice of a physician is the case of *Meyer v. St. Paul Mercury Indemnity Co., et al,* 61 So. 2d 901, decided by the Court of Appeals for the Parish of Orleans, on December 15, 1952. This case involved an alleged negligence of an oral surgeon and his anesthetist in the removal of the plaintiff's teeth after being referred to the oral surgeon by plaintiff's own dentist. The plaintiff alleged that at some time during the administration of an anesthetic and while she was unconscious one of her teeth was knocked loose and lodged in her lung, necessitating a serious operation for the removal therefrom. The operating oral surgeon and the anesthetist both alleged that they had used all of the skill and care commensurate with their duties. The plaintiff further sought to apply the doctrine of *res ipsa loquitur,* alleging that she was unconscious at the time of her injury and that the defendants were in a better position to know of it and guard against it for her. The trial court found no negligence on the part of the defendants and refused to apply the doctrine of *res ipsa loquitur.* The Court of Appeal, in an excellent opinion which considers a great many authorities in both the application of the doctrine of *res ipsa loquitur* and a consideration of the duties of an anesthetist and operating surgeon concluded that, although the mere fact that the defendants were professional people engaged in the performance of professional duties did not of itself prevent the application of the doctrine of *res ipsa loquitur,* nevertheless both defendants did all that reasonably careful practitioners, skilled in their respective professions could have done and that, consequently, there was no liability on the part of either of them.

Respectfully submitted,

CHARLES P. GOULD, *Chairman*
KENNETH P. GRUBB, *Vice Chairman*
WILLIAM T. CAMPBELL
GORDON R. CLOSE
RICHARD S. GIBBS
REX J. HANSON
L. DUNCAN LLOYD
GEORGE N. MECHAM
ROBERT R. PARRISH
CICERO C. SESSIONS
WAYNE E. STICHTER
JOHN P. FAUDE, *Ex Officio*

Report of Marine Insurance Committee

THE Marine Insurance Committee sorrowfully records, with deepest sympathy, the loss of its Chairman, Harry F. Stiles, of New Orleans by reason of his sad and untimely death in an airplane accident which occurred last February.

In view of the extent of participation by governments and their agencies in the shipping business with attendant claims for loss and damage to insured cargoes, it is believed that the subject of this report will be of value.

Your Committee respectfully submits the following on the subject of sovereign immunity. The Committee is much indebted to Mr. Oscar R. Houston of New York City for permission to print his remarks made during a discussion of "Sovereign Immunity of State Agencies" before the United Nations Lawyers Group and

Association of the Bar of the City of New York held in May 1953 at the United Nations Headquarters. The text as delivered by Mr. Houston is, as follows:

"The King can do no wrong" is a doctrine that comes to us from hoary antiquity. I do not know whether it arose because Augustus Caesar was also a god, or because the king usually has enough soldiers to carry out his wishes. However, the doctrine stood on unchallenged grounds in the 18th Century when Vattel, writing in 1787, said: [*Vattel, Law of Nations,* Sec. 4 (1787)]:

"But the body of the nation, the state, remains absolutely free and independent with respect to all men, or to foreign nations, while it does not voluntarily submit to them."

But the character of the sovereign has changed. The personal king who spent his time hunting, wenching and waging war, has given place to the impersonal sovereign that also operates merchant ships, buys and sells commodities and carries on business in competition with private enterprise. This change has brought a challenge to the classic doctrine. In 1824 in a case involving a bank incorporated and largely owned by a state, Chief Justice Marshall said: [*Bank of U. S. v. Planters' Bank,* 9 Wheat, 904, 907 (1824)]:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

In the United States the courts still uphold the doctrine of absolute immunity both in respect of the United States and in respect of foreign sovereigns sued in our courts. (*Berizzi Bros. v. The Pesaro,* 271 U. S. 562 (1926); *Isbrandtsen & Co. v. Netherlands East Indies,* 1947 A.M.C. 1739]. The doctrine has not been followed without opposition and dissents and the plea of sovereign immunity has been hedged about by various rules of practice and substantive law which have often made it very difficult for a foreign sovereign to escape liability in respect of a commercial venture.

The legislative and executive branches of our government, however, have gone the other way. In a series of statutes beginning with the Court of Claims Act (Court of Claims Act, 28 U. S. Code 1491 *et seq.*), the Suits in Admiralty Act (Suits in Admiralty Act, 46 U. S. Code 741 *et seq.*), the Public Vessels Act (Public Vessels Act, 46 U. S. Code 781 *et seq.*), and finally the Tort Claims Act (Tort Claims Act, 28 U. S. Code 1346, 2674 *et alia.*), Congress has, for practical purposes, abolished the immunity of the United States in our courts.

The next step was taken by the Maritime Administration when it adopted the policy that immunity should not be claimed for American government-owned merchant ships if sued in foreign ports. (Am. J. of Int. Law, Vol. 47, page 94).

The final step was taken by the State Department on May 19, 1952, when it announced that the Department would not thereafter request the courts to grant immunity to any foreign sovereign with respect to "private acts (*jur gestionis*)," by which I take it is meant commercial activities. (Department of State Bulletin, Vol XXVI No. 678, page 984).

In England the courts have likewise sustained the right of immunity for the British Crown and for the benefit of all foreign sovereigns, but over very strong dissents in the latest case, The Cristina. [The Cristina, (1938) A. C. 485]. They did allow at least two subterfuges. It has always been the British law that in case of a collision with one of His Majesty's warships, a private litigant could sue the captain and the government would defend the action and, if the warship was held at fault, would pay the bill. [The Birkenhead, 3 W. Rob. 75 (166 Eng. Rep. 891)]. And in the case of The Jupiter, 1927, p. 122, the court shut its eyes to immunity claimed by purchase from Russia on the ground that the master had accepted a private litigant as true owner of the vessel. [The Jupiter (1927) p. 122].

The British Parliament has been much more liberal and in the Crown Proceedings Act of 1947 has permitted suits in the British courts against the Crown in respect of substantially all classes of claims, both commercial and sovereign. [The Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 44)].

A further interesting step has been taken. An American airline claimed to

own a fleet of planes which were in possession of representatives of the Chinese Communist Government on the airfield in the Colony of Hong Kong. The Chinese Government claimed immunity. Thereupon an Order in Council was issued conferring jurisdiction of the litigation upon the Supreme Court of Hong Kong. On appeal the Privy Council adjudicated the case upon the merits and awarded the airplanes to the American company. [*Civil Air Transport, Inc. v. Central Air Transport Corp.* (1952) 2 Lloyd's Rep. 259].

Great Britain, however, continues to grant immunity to foreign sovereigns, and I believe it also claims immunity against suit in the courts of any other sovereign. At least it did so in the two cases with which I had to do: The Aquitania, after the First World War, and The Archer during the Second World War.

In countries whose jurisprudence is based on the civil law, the situation is somewhat different. In many if not all of them, a private citizen may sue the sovereign in his own courts. In my own experience the Conseil d'Etat has not hesitated to decide against the French Government, and I believe an adequate remedy is probably afforded in the courts of many countries.

It is difficult to determine accurately which of these countries grant immunity to foreign sovereigns in respect of commercial operations. So far as I have been able to ascertain, the situation is as follows:

The following countries do not grant immunity: Austria, Belgium, Egypt, Italy, France, Greece and Switzerland.

The following countries probably do not grant immunity, although this may not be free from doubt: Argentina, Denmark, Germany, Netherlands, Peru and Sweden.

In addition, the following countries have ratified the Brussels Convention (to which I shall refer in a few minutes), thereby waiving their claim of immunity in respect of commercial vessels: Brazil, Chile, Norway and Portugal.

Some of the countries now behind the Iron Curtain also ratified the Convention, but I believe the situation now is that Russia and her satellites claim immunity abroad, (*Low v. S.S. "Rossia,"* 1948 A.M.C. 814), but probably do not grant it at home. It should be noted, however, that Soviet trading organizations, like Amtorg, are often set up in such fashion that they are not entitled to immunity and in England, in particular, they have supplied a feast of litigation for the members of the Bar.

I find it even more difficult to determine what countries claim immunity abroad. Brazil, which operates a large fleet of commercial ships, has never pleaded immunity. In one case in which I represented the Brazilian Government and proposed to file such a plea, I was reprimanded by my client.

The United States of Colombia, Venezuela and Ecuador, who engage in commerce and operate a line of steamships known as the Gran Colombiana, likewise never claim immunity.

Mexico, on the other hand, has on occasion pleaded immunity, [*Mexico v. Hoffman,* 324 U.S. 30, 40 (1945)], and so have France, Italy and The Netherlands [*Berizzi Bros. v. The Pesaro,* 271 U.S. 562 (1926); *Isbrandtsen & Co. v. Netherlands East Indies,* 1947 A.M.C. 1739].

The Brussels Convention of April 10, 1926, provided as follows: "Seagoing ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment."

The Convention has been ratified or adhered to by 15 countries, not including, however, Great Britain, France or the United States.

There is one further question that needs to be referred to and that is the question of what follows when a private claimant obtains a judgment or decree against the sovereign. I have obtained a number of judgments against the United States, but I have never tried to send the marshal down to levy execution upon the furniture in the White House. I doubt if I would succeed. So far as I know, no countries at present allow the levy of execution upon government property to satisfy a judgment, except possibly France. [*Dexter & Carpenter v. Kunglig Jarnvagss Tyrelsen,* 43 F. (2d) 705 (1930); Am. J. of Int. Law, Vol. 46, p. 520]. This does not mean that the judgment creditor is without a remedy. In the United States, it has been held in

The Virginia that mandamus will lie to compel the payment of a judgment for just compensation over the vigorous opposition of the General Accounting Office. [The Virginia (Payment)] (*National Bulk Carriers, Inc. v. Warren*), 1949 A.M.C. 624). There are probably similar remedies in other countries.

There is an excellent review of the subject by Prof. William M. Bishop in Am. J. of Int. Law, Vol. 47, p. 93 (January 1953). See also the address on the Immunity of International Organizations by Hans Aufricht at the American Society of International Law meeting in 1952, and the article by Paul Abel in Am. J. of Int. Law, Vol. 45, p. 554).

I have attempted to cover rather a wide field and I dare not hope that I have avoided all errors.

I have tried to avoid expressing my own views of what the law should be, although they have perhaps leaked out somewhere in my remarks. What the law should be will be dealt with by the later speakers.

It is hoped that the above will stimulate further interest in this topic and that additional articles may be obtained from those who have made a study of the problem.

Respectfully submitted,

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Report of Practice and Procedure Committee

IT has been said "There is nothing new under the sun." In the face of this precedent, a committee of this Association should not expect to present anything startlingly new. This report is no exception. We have covered some familiar ground—and, we hope, some not too familiar—on Federal Discovery Procedure, with particular emphasis upon some of the discovery techniques which may be used by defense counsel. The *Hickman case* (*Hickman v. Taylor*, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed 451) is by no means a one-way street. The means, methods and mechanics of discovery are just as available to counsel for the insurance company as they are to the "poor, penniless plaintiff." Actually this report may be considered as a supplement to the Open Forum held at our Bretton Woods meeting in 1949. Messrs. Moody, Hobson and Varnum presented papers dealing with various phases of discovery and we recommend a review of those papers in the January 1950 Insurance Counsel Journal. But four long and eventful years have passed since then. Many courts have considered and construed the *Hickman case*. Numerous guideposts have emerged to aid the careful practitioner in the preparation of his defense. We hope this report may lend some assistance to counsel who are constantly confronted with these problems in the preparation and defense of insurance cases.

There is no doubt but what the discovery procedures have been used more extensively by plaintiff's attorneys than by counsel for defendants. Frequently the defense is in a position to obtain a prompt and complete investigation of an accident, including photographs, diagrams, the real evidence such as defective machines, and other objects, and, of course, signed statements from witnesses. The plaintiff's attorney comes on the scene at a later time, (in some jurisdictions this may not be true) and the discovery procedures have been used to obtain from the defendant much of the information which has been so painstakingly assembled. But this is not always the case. As any defense counsel knows, a plaintiff's attorney is often retained soon after an accident, and has interviewed and "sewed-up" witnesses and defendants' representatives, obtained photographs, appropriated evidence, made plats and generally "covered the waterfront" before the home office refers the matter to defense counsel. This is the situation in which the Federal Discovery procedure can be put to work for the defense. The discovery procedures have been

primarily a weapon in the hands of plaintiff. It is time to turn the tables and utilize them as a weapon of our own. We felt that it might be helpful to re-examine the Federal Discovery procedures, giving attention to the practical uses that can be made by defendants' attorneys in light of the recent decisions.

A panel discussion on the operation of Federal Discovery is reported at 12 F.R.D. 131. There Mr. William H. Speck, of the Administrative Office of the United States Courts, points out that interrogatories have been used primarily by plaintiffs. It is the observation of this committee that Mr. Speck's conclusion is correct, and the reported decisions therefore deal primarily with plaintiff's use of the discovery technique. Defendants, however, are gradually discovering the benefits of the discovery techniques, and the decisions show a growing realization by defendants that they have been ignoring a capable ally. In the four years since our 1949 meeting, a number of decisions report defendants' effective and telling use of the discovery procedure.

The decision of *Hickman v. Taylor* came like a bombshell and caused great consternation in the ranks of defense counsel. Plaintiff in that case, by interrogatories under Rule 33, sought to compel defendant's attorneys to produce signed statements taken in the course of preparing the case for trial. Actually the majority opinion delivered by Mr. Justice Murphy did not compel the production of these statements, on the ground that interrogatories under Rule 33 are subject to the same qualifications as motions for production of documents and physical objects for copying and inspection under Rule 34, requiring that good cause be shown, and that there had been an insufficient showing of good cause. While the actual holding of the court was somewhat limited, there is loose language in the opinion to support almost any argument to be made by any party for the production of most anything. Conflicting decisions were inevitable. The passage of the years has not clarified the situation entirely, but there seems to be some indication that the "bark was worse than the bite" and that the courts are gradually reaching some uniformity in their interpretation of this decision.

Rules 33 and 34 were the focal points in the *Hickman case* and therefore we are directing our principal attention to these two rules. Other rules, such as Rule 26, providing for depositions, and Rule 35, providing for physical examinations, are incidentally discussed, but the primary emphasis is laid on the rules providing for interrogatories and production of objects.

A few preliminary observations concerning the basic operation under the rules may be helpful. Rule 33 provides for interrogatories to be answered by the opposing parties. The answers must be in writing under oath, and signed by the person making them. Leave of court is required for serving more than one set of interrogatories to the same party. It is to be noted that no requirement of good cause is exacted by Rule 33. Complications arise, however, when a party seeks to obtain a copy of a signed statement under Rule 33. Here, under the holding in the *Hickman case*, the proceeding is actually one that should be carried out under Rule 34, and the showing of good cause will be required if the party is to be allowed to continue to seek such information under Rule 33. The courts have been uniform in their interpretation of Rule 33 in holding that it is no defense to claim the proceeding is a mere "fishing expedition," and interrogatories will be sustained if the court feels that they will lead to the discovery of admissible evidence, or if they will lead to the discovery of facts that will indicate the existence of other items of relevant admissible evidence.

Rule 34 provides for motions to produce documents or objects for inspection, copying or photographing. A number of qualifications are provided in this rule. The objects or documents (1) must be positively identified, (2) must be in the possession, custody or control of the person from whom they are sought, (3) must contain evidence material to any matter involved in the action, and (4) there must be a showing of good cause. These four elements must all be set out in motion to produce, or in a supporting affidavit. The courts rather uniformly hold that "fishing expeditions" will not be allowed under Rule 34, and that the proper procedure is to learn the location and exact identity of the documents or objects by interrogatories under Rule 33, and then to file a motion under Rule 34 showing good cause for the production of such documents or objects. Thus in operation the two rules are supplementary and together provide an effective and inexpensive method of

obtaining information from plaintiffs. The usage of these two rules is particularly important, as under the notice pleading that is adopted by the Federal Rules of Civil Procedure, the courts have repeatedly held that the particulars of a cause of action stated by plaintiff must be obtained through discovery procedures. These two rules provide the simplest and least expensive methods for obtaining the basis upon which plaintiff is bringing suit.

We felt that one of the principal objectives of our report should be to point out the uses defendants might make of discovery procedure in obtaining all the information possible from plaintiffs. We felt it would also be valuable to devote some discussion to defensive measures which might be adopted against plaintiff's use of the discovery procedure, with particular reference to the recent decisions construing the good cause requirement under Rule 34. In addition, we concluded some study should be made of the cases dealing with the suggestion in the *Hickman case,* that an attorney's deposition might be taken, together with a subpoena *duces tecum* ordering him to produce his file. Other cases of general interest to defendants' attorneys will also be indicated.

I.
Uses By Defendants of Discovery Procedures

The primary uses which may be made by defendants of the discovery procedures are in determining the nature of the claim that the plaintiff is making, and in determining the basis for plaintiff's damages. In addition, defendant may secure the names of witnesses from plaintiff and, upon proper showing, may secure copies of any statements taken by plaintiff or plaintiff's attorney, just as plaintiffs have been so industrious in doing. In addition, documents, photographs and records may be secured which will enable defendant to better evaluate the claim which plaintiff is pressing.

Some mention should be made of the discussion by Mr. Robert P. Hobson of Louisville, Kentucky, before this group four years ago. At that time the defendants' attorneys were still attempting to recover from the effect of *Hickman v. Taylor,* and most of their efforts had been directed to criticism of that opinion and at the operation of the Federal Rules. At that time relatively few cases had been decided in which defendant had made effective use of the discovery procedure. Mr. Hobson pointed to decisions sustaining defendant's interrogatories requesting specification as to what part of defendant's premises was the scene of the injury, who was present at the time and the nature of any defect. Interrogatories were discussed requesting the earning record of plaintiff. The names of witnesses, doctors, hospitals and nurses attending plaintiff could be obtained. One case was cited indicating that defendant might obtain information concerning the subrogation rights under which plaintiff brought suit. Mr. Hobson outlined a number of questions regarding the injuries of plaintiff, claims against other persons, places of treatment and names of doctors and hospitals, relationship to other witnesses, and a request for written statements obtained from any witnesses. The cases decided since that time show that defendants are proceeding along the lines outlined by Mr. Hobson, and the cases indicate that defendants' attorneys are using interrogatories for these purposes and are, from time to time, discovering new uses for interrogatories and motions to produce under the individual facts of a given case.

a. *Ascertaining Nature of Plaintiff's Claim*

Probably the most important use that a defendant can make of the discovery procedures is to ascertain the nature of claim which plaintiff is pressing. Rule 8, Federal Rules of Civil Procedure, provides that plaintiff's complaint should set forth a "short and plain statement of the claim showing that pleader is entitled to relief," which amounts to mere Notice Pleading. The complaints filed under this notice pleading statute frequently give defendants little information concerning the real nature of the claim being made. Defendant may have little or no information concerning the claim, and the most effective and inexpensive method to determine the basis for this claim is to file interrogatories under Rule 33. The nature of this problem is discussed in the recent patent infringement suit of *Drake v. Pycope,* 96 F. Supp. 331 (U. S. D. C., N. D. Ohio, E. D. 1951) where plaintiff's objections to defendant's interrogatories were overruled, the court stating (1. c. 331-332):

> " . . . Such a complaint, of course, is proper but as respects information, it

merely gives defendant notice that he is being sued, and little else. Some procedure should be made available by which defendant may obtain the information necessary to defend properly the lawsuit. Two methods are open to defendant, a motion for a more definite statement or the discovery procedure. This court has many times in the past indicated that the proper method is the use of the discovery procedures, and cannot allow discovery by interrogatories to become entangled in a mass of objections, else the defendant will be wholly unable to obtain the necessary information. This is especially true where plaintiff does nothing more in his complaint than give notice of the lawsuit. Objections going to opinion or interpretation of claims therefore must be brushed aside where, as here, the interrogatories are directed to discovery of the exact nature of plaintiff's claim."

As is indicated in this opinion, the proper method for discovering the basis of plaintiff's claim is to file interrogatories. In most instances such interrogatories will be allowed in order to advise the defendant the basis of plaintiff's claim. The problems arise in applying the general rule stated above to the individual factual situations in the case which defendant's attorney may be handling. The difficulty in framing questions which seek the basis for plaintiff's claim is that the interrogatories must seek out the facts on which plaintiff relies, and must avoid requesting the opinions or conclusions of plaintiff. Frequently the line of demarcation is difficult to draw. It is quite clear that defendant may use interrogatories where plaintiff falls on the premises. There defendant may inquire as to the exact location of the fall, and any condition or defect which existed at that time. Mr. Hobson's report of four years ago includes the case of *Eureka-Security Fire & Marine Ins. Co. v. American Stores Co.*, 6 F.R.D. 611 (U. S. D. C., E.D. Pa., 1946) wherein this situation existed (l. c. 611):

" . . . The charge of negligence may be based upon defective equipment or with the physical condition of a place or building, in which case the defendants should certainly be informed of alleged defects. Or it may have to do with the negligence of agents or employees, in which case the defendants are entitled to know which employees, provided that information can be given, and what they did that caused the damage. These facts can and should be brought out by discovery procedure."

The court in this case expressly distinguished the situation where plaintiff addresses an interrogatory to a defendant pleading contributory negligence. The court states that a pleading that plaintiff was injured by his own negligence would be sufficient and that it would not be necessary to set out fully the basis for such claim.

Another case where interrogatories may be effectively used is one in which the accident is caused by allegedly defective machinery. This problem was discussed in an early case under the Federal rules, *Landry v. O'Hara Vessels, Inc.*, 29 F. Supp. 423 (U. S. D. C., D. Mass. 1939) where plaintiff was injured aboard a fishing schooner operated by defendant, and defendant filed a series of interrogatories seeking the basis for plaintiff's claim. One interrogatory was as follows (l. c. 425):

" '20. Please describe fully in your own way how the alleged accident occurred, stating what you did and what act or acts the defendant did or neglected to do at the time of the accident which you allege were negligent.' "

The court in effect held that plaintiff need not answer that part of the interrogatory calling for his view as to the negligent act of defendant, and stated that the answer may be confined to a statement as to how the accident occurred, stating what plaintiff did and what act or acts defendant did at the time of the accident. The answer thus is limited to the facts which plaintiff might be able to state, and excludes any opinion or conclusion. In addition, interrogatories were framed inquiring as to whose duty it was to inspect and maintain the machinery or motor; whether plaintiff had ever overhauled the machinery or motor, and, if so, when; whether plaintiff had operated the machinery in question within 48 hours, and, if so, when and under what circumstances; if anyone else within the knowledge of plaintiff had operated the machinery or motor within 24 hours; and whether plaintiff had inspected or adjusted the carburetor and timing apparatus and, if so, to describe the condition of the apparatus at the time of the accident. The court held that these

questions concerning the mechanical condition of the motor or machinery should be answered if the previous interrogtatory indicated that the accident occurred through some defect in the motor or machinery.

In *Bailey v. General Seafoods, Inc.*, 26 F. Supp. 391, (U. S. D. C., D. Mass. 1939) defendant asked plaintiff what he was doing at the time he received his injury. The general answer that a strap broke causing the block to become loose which struck plaintiff, was held insufficient, and the court required a more specific and detailed answer.

Interrogatories going to the basis of plaintiff's claim were objected to in *State of Maryland to Use of Peters, et al, v. Baltimore & Ohio R. Co.*, 7 F. R. D. 666 (U. S. D. C., E. D., Pa. 1947) and objections were sustained as the interrogatories had been directed to plaintiff's attorney. In dictum, however, the court indicated that the interrogatory could have been properly put to the plaintiff, and an answer required. The interrogatory asked for "the facts which form the basis for" various allegations of negligence such as the allegation "that defendant's train failed to maintain proper safety equipment in working order," the rate of speed plaintiff claims the train was traveling, if the deceased was alone at the time of the accident, and, if not, who was with him, and the names of witnesses. The court indicated that plaintiff should be required to answer these interrogatories.

As previously indicated, the principal restriction on questions which defendant can ask plaintiff regarding the facts of the accident is the prohibition against requesting conclusions and opinions. A number of decisions have been based on this rule, and a defendant's attorney must be extremely careful in phrasing such questions. In *Bugen et al v. Friedman*, 10 F.R.D. 231 (U. S. D. C., E. D. Pa., 1950) the plaintiff in a malpractice case asked defendant, if he charged contributory negligence, upon what conduct, act or omissions of the plaintiff such charge was based. The court held that this question called for a conclusion or opinion, but went on to add that the desired facts could be ascertained by properly phrased interrogatories or requests for admission. The court condemned what was referred to as a "shot-gun query" under the general heading of contributory negligence. This case referred to two earlier decisions, *Doucette v. Howe*, 1 F.R.D. 18 (U. S. D. C., D. Mass. 1939) and *Doucette v. Eastern States Transport Co., Inc.*, 1 F.R.D. 66 (U. S. D. C., D. Mass., 1939). In the *Howe case* the folllowing interrogatories of the plaintiff were disapproved as calling for opinions and conclusions (1. c. 18):

> " '19. Please state what, if anything, was done by you in the operation of the said motor vehicle in an attempt to avoid the alleged accident.'
>
> " '21. Please state each and every act or omission to act on the part of the plaintiff which you claim in any way contributed to the alleged accident.' "

This interrogatory posed by defendant was also disapproved (1. c. 19):

> " '26. Please state fully and in detail what act or acts the defendant did or failed to do which caused you injury.' "

Similar questions were disapproved for the same reason in the related *Eastern States Transport Company case*. An examination of the three questions indicates that the elements found objectionable were the calling for the relationship of the facts to the manner in which the accident occurred, the inquiry as to what specific acts could have been taken to avoid the accident, and which particular act caused the accident and injury. A more careful wording of the interrogatories would have asked only for the facts as to what plaintiff or defendant did immediately before the accident and any facts concerning the condition of the vehicle, of any signals or warnings given, and would have omitted any reference as to how these acts caused the collision or accident and in what respect they were claimed to be negligent by one of the parties. In *Moorman v. Simon*, 8 F.R.D. 328 (U. S. D. C., W. D. Mo., W. D. 1947) the plaintiff asked defendant for an opinion as to the speed at which defendant was driving at the time of collision, and the court held that this clearly was a matter of opinion and not the appropriate subject matter for interrogatories.

In the panel discussion which appears at 12 F. R. D. 131, Mr. John W. Willis, of the Federal Rules Service, criticizes the above rule relating to conclusions and opinions, stating (1. c. 162):

> "In other words, the party can make a general allegation in his pleading and, while you can get at the facts by discov-

ery, you cannot ascertain by discovery what the party contends the facts were or what their legal consequences were."

This limitation, as indicated by Mr. Willis, places limitations on the use which defendant may make of interrogatories. It stands as a barrier which the defendant must avoid in posing interrogatories to plaintiff, and careful attention must be given that the questions call for facts, not opinions or conclusions as to the legal consequences of such facts, such as which act or omission constituted the negligent conduct. Interrogatories can be framed which ask for the exact location of the accident, plaintiff's act at the time of the accident, defendant's act at the time of the accident, any warnings given, speed and location of vehicles, other passengers, any witnesses, and so on, just so long as the questions are framed so as to avoid asking for opinions and conclusions. Careful attention to the wording of the questions, in the light of the particular accident in question, should enable the defendant's attorney to frame questions that will obtain the desired information from plaintiff as to the basic facts concerning the accident in question without asking for opinions and conclusions.

b. *Ascertaining Nature and Extent of Damages*

Another very valuable use which defendant can make of the discovery procedures is that of ascertaining the nature and extent of the damages claimed by plaintiff. Information concerning the complaints and treatment of injuries or disease, identity of hospitals, doctors and nurses and dates of treatment, as well as information regarding employment and income, may all be obtained by proper discovery procedures. In *Srybnik v. Epstein et al,* 13 F.R.D. 248 (U. S. D. C., S. D. N. Y., 1952) a motion to produce was granted as to documents showing the extent of dates of employment, capacity and last known address. In *Lowe v. Greyhound Corp.,* 25 F. Supp. 643, (U. S. D. C., D. Mass., 1938) an interrogatory asked the place of occupation and compensation received by plaintiff, and the court held that an answer giving the weekly compensation in a certain town was insufficient, and that plaintiff's employer should be disclosed. A related problem concerning the income of plaintiff is that of income tax returns, and in *Connecticut Importing Co. v. Continental Distilling Corporation et al,* 1 F.R.D. 190 (U. S. D. C., D. Conn., 1940) although not a personal injury suit but a suit for loss of profits, the defendant filed a motion for production of duplicates of plaintiff's income tax returns for specified years, and the court held that the returns were not privileged and ordered production. The court states (1. c. 192):

> " . . . On this issue of damages, surely the plaintiff's income both before and after the critical date is highly relevant. And the plaintiff's tax returns normally might be expected to contain information as to such income."

It is thus seen that interrogatories and motions to produce provide an effective weapon in the hands of defendant to determine the dates of employment, capacity, employer, and the income received.

The defendant can likewise make telling and effective use of the discovery procedures in obtaining information concerning the physical condition of plaintiff. Defendant can inquire as to plaintiff's condition before the accident, the symptoms and complaints immediately following the accident, the course of recovery, the complaints at the time the interrogatories are put, the places of treatment, including names of doctors, nurses and hospitals, the itemized cost of such treatments, and other questions that might be in issue in the individual cases. An interesting decision is *Lowe v. Greyhound Corp.,* 25 F. Supp. 643 (U. S. D. C., D. Mass., 1938) where extensive interrogatories were based on medical evidence. These sought information as to the objective injuries noted immediately following the accident, the treatment rendered, an itemized list of hospital charges, a list of physicians and nurses treating plaintiff, the state of recovery, and from which injuries plaintiff had partially recovered, and the opinion indicates detailed answers were filed to the interrogatories. The court indicated that although a complete hospital bill had not been received it was plaintiff's duty to make inquiry in order to determine as exactly as possible what the medical expenses would be. In addition, the court pointed out that while limitations would be placed on the interrogatory asking for information relating to recovery, that an answer must be made with some degree of definiteness.

In *Graver Tank & Mfg. Corp. v. James B. Berry Sons Co., Inc.*, 1 F.R.D. 163 (U. S. D. C., W. D. Pa., 1940) defendant submitted an interrogatory asking for details of the injuries claimed to have been received in an accident by four of plaintiff's employees. The objection was overruled and the court ordered the interrogatory answered, inasmuch as plaintiff was claiming damages which included funeral and medical expenses of the employees killed and injured.

Some lessons can be learned from cases in which plaintiffs seek information from defendants. Thus in *Jones v. Pennsylvania R. Co.*, 7 F.R.D. 662 (U. S. D. C., N. D. Ill., E. D. 1947) plaintiff filed interrogatories asking whether defendant had medical reports or x-ray reports as to plaintiff's injuries, the names of company doctors, if any, and dates and places of treatment and the nature of treatment, and copies of reports. The court held that plaintiff was not entitled to the reports themselves but was entitled to the rest of the information requested. Defense counsel should be able to procure just such information from plaintiffs by properly worded interrogatories.

Likewise in *Smith v. Aetna Life Insurance Company et al*, 8 F.R.D. 554 (U. S. D. C., E.D. N. Y., 1949), plaintiff filed interrogatories asking defendant insurer for a statement of the nature of the alleged disease of the brain or nervous system which defendant was contending caused the disability to plaintiff rather than the alleged accident. A rather general answer was filed by defendant, and plaintiff's motion calling upon defendant to give a more detailed answer was sustained. Interrogatories such as this, calling for information relating to prior medical condition, frequently have an important part in determining the value of plaintiff's claim. One limitation that should be observed in asking questions concerning prior accidents, illnesses or operations, however, was indicated in *Landry v. O'Hara Vessels, Inc.*, 29 F. Supp. 423, (U. S. D. C., D. Mass., 1939) where the following interrogatory was put (l. c. 424):

"'10. Have you had any accidents, illnesses, diseases or operations prior or subsequent to the date of this accident and if so, please state fully the nature of such accidents, illnesses, diseases or operations and when and where you sustained or suffered them, and any hospitals you have attended and any doctors who have treated you during the periods above referred to.'"

The court pointed out that the answer to this interrogatory should be limited to a period of five years before the accident and since the accident up to the date of the answer. Thus a limitation of relevancy will be placed on interrogatories calling for information relating to prior accidents, and a time limitation will be made.

A problem related to that of framing interrogatories so as to discover medical information in the hands of plaintiff is that of attempting to obtain reports of medical examinations in the possession of plaintiff. There seems to be little agreement in the decisions of the courts concerning such procedure, but a recent decision by the Court of Appeals for the District of Columbia, *Sher v. DeHaven et al*, 199 Fed. 2d 777, (U. S. C. C. A., D. C., 1952) held that medical reports were privileged and not subject to discovery under Rule 34, and that as plaintiff had not requested and received copies of defendant's medical reports, plaintiff was not subject to defendant's motion under Rule 35 for copies of medical reports.

The holdings on this question are quite contradictory. Thus in *Allen v. River Terminal R. Co.*, 10 F.R.D. 394, (U. S. D. C., N. D. Ohio, E. D., 1950) the court went so far as to state that although documents may not ordinarily be obtained under Rule 33, there is an exception in permitting discovery of the contents of doctors' reports by the use of Rule 33. This case seemed to place no qualifications on the right to obtain the contents of medical reports under Rule 33. Other cases have involved a more peculiar factual situation, and the courts have held that medical reports should be produced for inspection and copying. In *Cox v. Pennsylvania R. Co.*, 9 F.R.D. 517 (U. S. D. C., S.D. N. Y., 1949) plaintiff had been examined 20 months before trial, and a more recent examination refused. Plaintiff's attorneys refused to exchange medical reports. Defendant argued that plaintiff was claiming to have a post-traumatic neurosis and defendant wished to know the neurological findings on which such conclusion could be based, and any changes in plaintiff's condition since the last medical examination. Defendant acted under Rule 34, and the

medical report was ordered produced. This case was specifically referred to in the opinion of *Sher v. DeHaven,* and the court plainly disagreed with the results. In *Lindsay v. Prince,* 8 F.R.D. 233, (U. S. D. C., N. D. Ohio, W. D. 1948) defendant sought copies of the reports of examining physicians as to the physical condition of plaintiff. In that case defendant contended that he was not involved in the accident, and had no knowledge concerning the facts. Defendant obtained physical examination of the plaintiff, and the court indicated that under Rule 35, defendant would be entitled to a copy of plaintiff's report after delivering a copy of the defendant's examination report to plaintiff. Assuming that these provisions of Rule 35 had been complied with, defendant's motion for the production of plaintiff's physical examination report was granted.

A more restricted view of Rule 35 was taken in *Sher v. DeHaven et al,* supra. There defendant filed a motion that plaintiff be required to produce for inspection and copying the reports of five physicians treating plaintiff after the accident. The reason given for the motion was that defendant was willing to supply plaintiff with a copy of the medical report of defendant's medical examiner. The court brushed aside the question of good cause, holding that the documents were privileged and not subject to discovery under Rule 34. The court then went on to discuss Rule 35, relating to physical and mental examinations, and exchange of reports under such rule, and concluded that though defendant was willing to furnish such reports to plaintiff, plaintiff had not requested the reports and had not received them, and thus defendant was not entitled under Rule 35 to demand the reports from plaintiff. The court adopted a strict interpretation of Rule 35 and, unfortunately for defendant, were no doubt correct in their interpretation of the language of this rule.

A number of other interesting decisions touch upon a different phase of discovery procedure under Rules 33 and 34. These are the cases where defendant seeks to obtain Selective Service records, particularly those including a physical examination of plaintiff. But in this situation a foundation for the production must first be laid and in some manner the plaintiff must waive his privilege. In *Gray v. Bernuth, Lembcke Co., Inc.,* 8 F.R.D. 358 (U. S. D. C., E.D. Pa., 1948) the defendant filed a motion under Rule 34 for Selective Service records, but as no waiver was present the motion was denied. In *Young v. Terminal R. R. Assn. of St. Louis,* 70 F. Supp. 106, (U. S. D. C., E.D. Mo., E.D. 1947) the plaintiff on the witness stand stated that he had no objection to the defendant introducing the records of the Selective Service physical examination. The court held that the testimony under oath, reduced to shorthand and transcribed, was a writing so as to meet the requirements of an authorization in writing, and that the privilege was waived as to these documents. Likewise in *McGlothlan v. Pennsylvania R. Co.,* 170 Fed. 2d. 121, there was a similar waiver both by plaintiff and the Veterans Administration allowing the production of reports of the Veterans Administration. If a waiver can be obtained from plaintiff either in open court, or in depositions, it is possible that a motion to produce Selective Service records can be successful. This is a possibility that defendant's attorneys should explore. Counsel must use diligence, however, in attempting to obtain a waiver so as to lay the foundation for production of such documents.

Defense counsel thus has available the full use of discovery procedures in obtaining medical information from plaintiffs. Interrogatories may be framed concerning prior physical condition, complaints immediately after injury, treatment, recovery, treating physicians, nurses, hospitals, expenses, and attempts can be made to obtain copies of medical reports, and possibly Selective Service records. The medical information, together with information that can be obtained as to employment, income, employer, time lost, as discovered by interrogatories, documents, and income tax returns, enables the defendant to obtain a much more complete picture as to the damages plaintiff will be able to prove. This is certainly helpful to the defense and it is a procedure that defense counsel should utilize more fully.

c. *Obtaining Witnesses, Statements, Documents and Photographs*

Lawsuits are won with witnesses and documentary evidence. What defense counsel hasn't faced the situation when he would trade his eye-teeth for one witness or a photograph of the vehicles before they were moved. All too frequently active plaintiff's counsel has been on the scene

and gotten actual photographs before the assured even realizes he is going to be sued. Discovery, to obtain witnesses' names, copies of their statements and photographs, may offer one means of balancing the scales of justice. Instead of "wishing" counsel, by judicious and proper use of the tools of discovery procedure, may be able to come up with that witness or that piece of evidence so necessary for the successful defense of a damage suit. You golfers wouldn't play a match with your seven iron unused in your bag; don't leave Rules 33 and 34 unused in your legal kit.

There is no question but that defendant can obtain from plaintiff the names of witnesses having knowledge of the facts of the case. *Colorado Milling & Elevator Co. v. American Cyanamid Co. et al,* 11 F.R.D. 580 (U. S. D. C., W.D. Mo., W.D. 1951); *Pacific Intermountain Express Co. v. Union Pacific R. Co.,* 10 F.R.D. 61 (U. S. D. C., W.D. Mo., W.D. 1950). Such interrogatories should not inquire as to the witnesses which plaintiff's attorneys will call at the trial, however. *McNamara et al v. Erschen et al,* 8 F.R.D. 427 (U. S. D. C., Del. 1948).

There may be occasions when defense counsel finds himself in the same position as plaintiff in *Hickman v. Taylor,* and wishes to obtain copies of signed statements of witnesses in plaintiff's possession. This situation may occur when the assured fails to notify anyone, or when the defendant denies having been involved in an accident. Plaintiff's counsel has been active from the outset and has a complete investigation, witnesses, statements and photographs. Upon proper showing, the court may require the production of this material under Rule 34. In *Lindsay v. Prince,* 8 F.R.D. 233, (D.C. N.D., Ohio W.D., 1948) defendant filed a motion for the production of all statements of witnesses, not privileged, containing relevant matter or evidence, for all papers, records, reports, letters, memoranda concerning oral statements made by witnesses to the accident, and copies of reports of examining physicians. The defendant contended that he had not been involved in the accident, and that after suit was filed the only witnesses that could be located were those given on the Ohio State Highway Patrol report, and these refused to give statements. Even though the procedure was properly by a motion to produce documents under Rule 34, and in spite of the fact the motion was worded in very general terms, the court held that there was a showing of good cause, and allowed the production, saying (l. c. 235):

> "While it may be better practice in a case of this kind for counsel desiring the information to first make use of interrogatories to require the other party to furnish a list of documents, papers or other records within the description contained in Rule 34, not privileged, and upon being furnished such a list to then file a motion for production of the particular documents which it is desired to inspect and make copies of, or while it may be possible for counsel for defendants in this case by taking the depositions of an officer of the Boutell Company or of the two witnesses whose names he obtained, yet the plain provisions of Rule 34 seem to permit a motion of the kind filed here and the granting of the same upon good cause, and it would seem to us that such cause has been shown by the affidavit filed in support of the motion."

This case illustrates that when defendant is able to show good cause, the court may order the production of documents in plaintiff's possession, thereby enabling defendant to more adequately prepare his defense.

The production of photographs in plaintiff's possession has been discussed in a number of decisions and the cases indicate that such production may be required. In *Brush v. Harkins,* 9 F.R.D. 681 (U. S. D. C., S.D. Mo., W.D., 1950) it was stated that defendant's counsel could file a motion for the production of photographs illustrating the appearance of conditions at the scene of the accident. This opinion stated that diagrams of the scene of the accident would probably not be ordered produced, as they would illustrate the attorney's notion of the accident, and not the testimony of witnesses. A more extreme question was presented in *Shields et al v. Sobelman et al,* 64 F. Supp. 619, (U. S. D. C., E.D. Pa., 1946) where plaintiff filed a motion for an order that defendant's attorney produce certain photographs of a winch which allegedly caused an injury to plaintiff. Defendant's attorney had gone to the vessel on which the accident occurred, and had personally directed the photographer in taking photographs of the winch so as to clearly illustrate the defense to the case. Although indicating the closeness of the

question that is presented, the court felt that even though the photographs represented to some extent the work product of the lawyer, they were somewhat closer to tangible evidence, such as the piece of machinery which caused the injury, and under the dictum of the Circuit Court opinion in *Hickman v. Taylor,* production of the photographs was ordered. The court pointed out that under some circumstances similar to this case, the photographs might be considered privileged, but under the circumstances of the case at bar the court felt that no privilege existed. Photographs were also ordered produced in *Pennsylvania R. Co. v. Julian,* 10 F.R.D. 452 (U. S. D. C., D. Del., 1950) from plaintiff who had taken photographs of the engine after collision, and of the scene of the accident shortly after the collision. The photographs had been prepared as a matter of routine in accordance with the established practice of the plaintiff railroad, and on showing of good cause, the court ordered production of the photographs.

Defendant may therefore obtain photographs in plaintiff's possession so long as good cause is shown and no privilege exists so as to protect the photographs. The proper way to obtain such photographs is by a motion to produce for inspection, copying or photographing under Rule 34, but it may be wise to lay the groundwork by interrogatories under Rule 33, so as to ascertain who took the photographs and who has possession and control of them.

Reports of the train crew were successfully sought through discovery procedures in *Pennsylvania R. Co. v. Julian,* supra, as defendant was able to make a showing of good cause based on the fact that suit was not brought until 11 months after the accident, and the reports filed with the plaintiff railroad were the only contemporaneous records of the event. In this case plaintiff railroad had filed a list of the witnesses to the accident, but the court held this was not sufficient and ordered that the reports of the train crew, claim agent, and medical examiner be produced for inspection and copying.

There is no doubt but that a defendant can move for production of documents in possession of plaintiff under Rule 34. Some courts have even allowed defendant to obtain documents under Rule 33. In *Alfred Pearson & Co. v. Hayes,* 9 F.R.D. 210, the court required the production of a document, the nature of which was not specified, as they were satisfied that good cause existed. In effect the court treated the interrogatory as a motion for production to inspect or copy, but ordered production of the document to avoid delay. A contrary conclusion was reached in *Woods v. Cressman,* 9 F.R.D. 717 (U. S. D. C., E.D. Pa., 1949) as the court pointed out that production of copies under Rule 33 had never been extended beyond statements of witnesses as to facts of which the witness has knowledge. Consequently it is recommended that if documents are desired, Rule 34 be used rather than trying to extend Rule 33 to include the documents.

In cases based on business transactions, books and records may be obtained by defendant in order to prepare for trial. Defendant successfully moved for the production of certain books and records for inspection and copying in *Campbell v. Johnson,* 11 F.R.D. 107 (U. S. D. C., D. N.Y., 1950), which was a suit based upon representations by defendant's testator in a sale of securities. The court said (1. c. 108):

> "It seems to me that defendant has shown good cause for the inspection and discovery sought here. A member of the accounting firm retained to assist in the defense of this action swears that it would be difficult for him or any other accountant to testify with respect to the many accounting problems without such inspection or to properly prepare for trial. The affidavit of defendant's attorney also indicates to me that such examination and inspection is necessary to properly defend this action."

The inspection was granted. Thus in suits involving business transactions, counsel should establish the necessity for inspecting the books and records and the court can order the documents desired. Needless to say, such records are an invaluable aid to the defendant in litigation of this kind.

Defense counsel should make full use of the discovery procedure in obtaining the names of plaintiff's witnesses, copies of statements, documents, photographs and business records. In obtaining this sort of information, counsel should ordinarily file interrogatories under Rule 33, and after ascertaining the description and location of such objects and documents, move for this production under Rule 34. In this manner counsel is more likely to succeed

in his efforts to obtain such evidence. Not only is he then better able to prepare his defense but he may also avoid some of those bitter experiences occasioned when plaintiff produces some evidence that comes as a complete surprise.

II.
Present Definition of "Good Cause" Under Rule 34

The decision in the case of *Hickman v. Taylor* raises two primary questions that must be considered in determining whether or not an interrogator will be able to obtain the production of documents or statements for inspection, copying or photographing. The first question is whether or not the item sought is privileged, and the second, whether good cause is shown for production. There is some language in the *Hickman case* on the matter of privilege from which defense counsel has taken some encouragement, but it must be remembered that the decision is actually based on public policy and a lack of showing of good cause. It was the opinion of this committee that the question of privilege under the discovery procedures has been rather exhaustively discussed heretofore, and in fact the majority of the furor caused by the *Hickman* decision has been directed to this phase of the opinion. Consequently we felt that the question of good cause could be more profitably discussed. Rule 34 provides that a person moving for the production of documents or objects for inspection, copying or photographing must show good cause. The cases have held that good cause must be shown either in the motion which is filed or in a supporting affidavit. It should be noted that where the interrogator under Rule 33 seeks copies of signed statements, the decision in *Hickman v. Taylor* requires that good cause be shown. It might be well to indicate also, that good cause, in most instances, presents a defense that is readily available to a defendant's attorney in resisting the attempts of the plaintiff to gain information from defendant's file. The privilege defense is available in only a relatively few situations, but good cause must be shown when a party moves for the production of any documents or objects for inspection, copying or photographing.

While there has been some conflict on the question, it has been held that good cause must be shown for the production of statements taken by investigators for the later use of attorneys. *Alltmont et al v. United States,* 177 F. 2d 971 (U. S. C. C. A., 3rd Cir., 1949), which involved Admiralty Rule 31, containing identical language to Rule 33.

A quite recent decision by one of the District Courts contains a rather thorough discussion of the "good cause" decisions, and points to two basic lines taken by those decisions. In *Goldner v. Chicago & N. W. Railway System,* 13 F.R.D. 326 (U. S. D. C., N.D. Ill., E.D. 1952) plaintiff sought to obtain copies of written statements which defendant had obtained from witnesses. Defendant had furnished plaintiff with a list of 11 witnesses, and there was no showing that plaintiff had interviewed or attempted to interview these witnesses. The court found that plaintiff had not shown good cause for production of the statements. Plaintiff also moved to take the deposition of a court reporter who took shorthand notes while defendant's attorney questioned plaintiff in the hospital, but this motion was denied although the court pointed out that plaintiff was in the hospital and not represented by counsel at the time, and that plaintiff had the right to inspect this statement. The court discusses the classification of the two views of good cause, and the following discussion begins at Page 328:

> "Rule 34 places upon the moving party the burden of showing good cause for ordering the production of documents. Of course, the nature of this burden cannot be defined precisely, for 'good cause' is necessarily an elastic term, and it must be defined and applied according to the circumstances surrounding each case. However, in cases involving the production of statements of witnesses, the courts have disagreed on even a rough definition of good cause. After an analysis of these cases, Professor Moore discerns the evolution of two distinct constructions of the term. 4 Moore's Federal Practice (2d ed.) §34.08. The more liberal construction of good cause, according to Moore, is expressed in *De Bruce v. Pennsylvania R. Co.,* D.C. Pa., 1947, 6 F.R.D. 403. In the opinion of the De Bruce Court, a defendant may be ordered to produce statements of witnesses if such statements were taken immediately after the accident occurred, if the plaintiff was unable to take the statements himself before the commencement of the

suit, and if the accident had occurred a considerable time before the filing of the motion for production. A second, and 'narrow' construction is expressed in *Alltmont v. United States,* 3 Cir., 1949, 177 F. 2d 971, 978, wherein the court stated that under Rule 34, a moving party

> "' . . . must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case.' "
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"It is important to note, however, that there are certain principles in this field upon which all courts agree. Moore points out that 'All courts agree that production should be allowed where it is shown that the statements may contain information which is not otherwise available to the moving party, as where the witnesses cannot be found or refuse to give information.' It is the opinion of this court that the converse of that principle is also a sound rule of law. That is, production should *not* be allowed where the witnesses may be found, and where the witnesses offer the desired information. In any event, production should not be allowed before the moving party has shown a bona fide attempt to obtain the information by independent investigation."

As pointed out by the court in the *Goldner case,* good cause is necessarily an elastic term, and great discretion is placed in the hands of the trial court. It would seem that more of the decisions in recent years have tended to follow the narrow construction of the *Alltmont* case, and that fewer courts are following the liberal interpretation of the DeBruce opinion. With this general statement in mind, it may be well to examine some of the specific instances that have been held good cause, and then to consider some of the situations which the courts have held did not amount to good cause, as well as the grounds for objections to the production of documents or objects for inspection, copying or photographing, which may be used if plaintiff's counsel seeks to sack your files.

One of the clearest cases in which the court seems to have little doubt that good cause is shown, is a widow in financial distress. In *Naylor v. Isthmian S. S. Co.,* 10 F.R.D. 128 (U. S. D. C., S.D. N.Y., 1950) plaintiff's attorney had obtained the names of witnesses in previous interrogatories, there was no showing of an attempt to obtain statements from these witnesses, and plaintiff's attorney had submitted an unsigned argument by letter to the court stating that plaintiff's attorney did not know the number of persons from whom defendant had taken statements. The court made a number of critical comments concerning plaintiff's attorney, and pointed out that the letter memorandum failed to show good cause, but the court pointed to the financial condition of the widow and held that good cause was shown, saying (1. c. 129):

> "However, the financial distress of the plaintiff, who is the widow of the deceased seaman, was deemed by Judge Knox sufficient to warrant preference in this case and he has put it down for trial on June 5 next. From what has been said above, the court fears that if the discovery is not granted the widow may either have to proceed to trial ill-prepared or lose her preference. This hard choice, it seems to the court, constitutes sufficient cause within the rule and the motion is therefore granted."

It is to be noted that the court stresses the fact that the judge had granted this case preference in the trial setting because of the financial distress of plaintiff. This factor seems to be one of the important questions to which the court will look when holding that financial distress is good cause.

This same factor of financial distress was relied upon in the case of *Bifferato v. States Marine Corp. of Delaware,* 11 F.R.D. 44 (U. S. D. C., S.D. N.Y., 1951) where plaintiff sought to obtain statements of the captain of the ship and other crew members. Here again the court criticized plaintiff's attorney for his lack of diligence but pointed out that plaintiff was unconscious

as a result of the accident, hospitalized for nine months, that the witnesses were unavailable for the taking of depositions, and stressed the fact that a preference had been granted by the judge in setting the case for trial because of the impoverished condition of the plaintiff. The importance as to the preferential status of the case because of the impoverished condition of plaintiff is further emphasized in the case of *Gebhard v. Isbrandtsen Co., Inc.*, 10 F.R.D. 119 (U. S. D. C., S.D. N.Y. 1950) in which illness and poverty of plaintiff were raised as showing good cause for production of statements and reports. The court, in holding the impoverished condition was not established, pointed out that plaintiff had failed to show that he had been prevented from obtaining the statements requested, and that there was question as to whether or not plaintiff had attempted to obtain the statements in more than a year's time after the filing of the complaint. While the affidavit states that plaintiff is "ill and on relief" the court observed that no facts were presented to support these assumptions and conclusions. The court felt that plaintiff had shown no more than that it was more convenient for plaintiff's attorneys to obtain the statements through a motion to produce for inspection and copying, and that this was not good cause within the meaning of Rule 34. Thus, while most courts will recognize that poverty is good cause for the production of statements, nevertheless there must be a strong showing in the affidavit that the impoverished condition actually exists.

A statement taken from plaintiff when he was under the influence of morphine administered by hospital authorities is a showing of good cause so as to merit the production of his statement. *Irvine v. Safeway Trails, Inc.*, 10 F.R.D. 586, (U. S. D. C., E.D. Pa., 1950).

Where plaintiff is unconscious after the accident, and is unable to obtain on the spot information, and where the defendant is equipped to gather such information immediately, it has been held that there is sufficient good cause to merit the production of statements given to a claims investigator of the defendant by various witnesses to the accident. *Newell v. Capital Transit Co.*, 7 F.R.D. 732 (U. S. D. C., D.C., 1948). The court also held that even though the claims adjusters in this case were attorneys, the statements were obtained in the regular course of business and that as such they were not privileged communications. This case would seem to be an illustration of the more liberal interpretations of the good cause requirement. Nevertheless it is indicative that courts will consider the fact that plaintiff was unconscious immediately after the accident in determining whether or not there is good cause for the production of statements from witnesses which are taken immediately following the accident.

Another quite liberal decision is *Miehle v. United States*, 11 F.R.D. 582 (U. S. D. C., S.D. N.Y., 1951), where plaintiff requested a copy of a signed statement given by him to defendant's agent approximately one month after the accident, and at a time when plaintiff was not represented by counsel. The court held that the fact that plaintiff was not represented at the time she gave the statement was good cause under Rule 34, and the discovery was allowed. A decision to the contrary is *Safeway Stores, Inc. v. Reynolds*, 176 F. 2d 476 (U. S. C. C. A., D.C., 1949).

One of the questions over which the courts have differed is whether or not the unavailability of witnesses, or the inconvenience in contacting them, is good cause requiring the production of their statements. Different results have been reached in different jurisdictions, the decisions apparently turning upon the other circumstances that may be shown by the moving parties attempting to gain the statements or documents. In *Pennsylvania R. Co. v. Julian*, 10 F.R.D. 452, (U. S. D. C., D. Del. 1950) defendant moved for the production of statements made by plaintiff's employees shortly after the accident. Suit was not brought until nearly 11 months later. The court stressed that this time lag, as well as the desirability of obtaining contemporaneous information, together with the unavailability of witnesses, and the difficulty and inconvenience that would be experienced by defendant in contacting them, amounted to good cause and justified the production of the statements. The same problem was present in *Brauner et al v. United States*, and *Reynolds v. United States*, 10 F.R.D. 468, (U. S. D. C., E.D. Pa. 1950) where plaintiffs sued for the production of the statements of three witnesses, soldiers who were in a plane in which plaintiff's decedent was killed, and the court ordered production. The court said (l.c. 470):

"The plaintiffs reside within a few miles of Philadelphia. The three witnesses whose names have been supplied are Army Air Force personnel stationed at three different Army air bases in Florida. The burden, expense and inconvenience to the plaintiffs involved in taking their depositions are factors for the court to consider in exercising its discretion, though of themselves they do not necessarily establish good cause. . . ."

As the court points out, the unavailability of the witnesses in itself does not establish good cause, but rather it is one of the factors to be considered by the court in exercising its discretion. In this case the defendant volunteered to bring the witnesses to Philadelphia at defendant's expense or to pay the expenses of plaintiff's attorney to go to Florida in order to take depositions, but the trial judge did not understand that a binding commitment had been made in this respect. This decision later was appealed to the United States Supreme Court, and this holding of the District Court was reversed on the ground of the privilege that was to be accorded military secrets. *United States v. Patricia J. Reynolds,* 97 L. Ed. (Advance) 519 (March 9, 1953). The District Court had refused the claim of privilege entered by the Government. The Supreme Court, in its opinion by Mr. Chief Justice Vinson, pointed out that the Air Force had offered to produce crew members for examination by plaintiffs, allowing the crew members to refresh their memories on any statements made to the Air Force, and authorizing testimony on all matters except those of a classified nature. The Supreme Court's opinion held that this offer should have been accepted. In spite of reversal on the other grounds, the language of this court regarding the inaccessibility of witnesses should still have validity.

A differing view on this same question was expressed in *Berger v. Central Vermont R.,* 8 F.R.D. 419 (U. S. D. C., D. Mass., 1948) where the court indicated that the unavailability of witnesses was not good cause and the motion under Rule 34 to inspect and copy the statements of the employees was denied. The court pointed out that the witnesses were open to interrogation by plaintiff even through the mail. This case was somewhat limited by the fact that the suit was brought in Massachusetts and the witnesses were to be found in Vermont. Thus it seems that the unavailability of witnesses, or the inconvenience and difficulty in contacting them, while not good cause in and of itself, is one of the factors which the court will favorably consider in determining the issue of good cause and whether the documents shall be produced.

The refusal of railroad employees to give statements to plaintiff's attorneys has been held good cause so as to merit the production of statements given by them to the railroad's representative. *Dusha v. Pennsylvania R. Co.,* 10 F.R.D. 150 (U. S. D. C., N.D. Ohio, W.D. 1950). The court felt that the good cause had not been established to its entire satisfaction but that the refusal on the part of the employees of the railroad justified the order that the statements should be produced.

At least one decision has indicated that where plaintiff is attempting to obtain a copy of his own statement, there is no necessity for showing good cause. *Cannon v. Aetna Freight Lines, Inc.,* 11 F.R.D. 93 (U. S. D. C., N.D. Ohio, E.D., 1950). This case does not further explain this rather unusual exception to the good cause requirement. A contrary result is found in *Bifferato v. States Marine Corp. of Delaware,* 11 F.R.D. 44 (U. S. D. C., S.D. N.Y. 1951), and the court states that the plaintiff must affirmatively make a showing of good cause in order to merit production of his own statement, saying (l.c. 48):

"Plaintiff also asks for the production of a copy of his own statement made to the defendant's representative. There is no showing that such statement, if any, was not voluntarily and fully given or that plaintiff was not in full possession of his faculties. It is not to be assumed that his recollection of the facts is different from any version set forth in the statement. In any event, good cause has not been shown so as to require the production of the statement. *Lester v. Isbrandtsen Co.,* D.C., 10 F.R.D. 338; *Safeway Stores, Inc. v. Reynolds,* 85 U. S. App. D.C. 194, 176 F. 2d 476."

These cases indicate the approximate limits that are now recognized by the courts in determining good cause. Poverty that is acknowledged by preferential placement on the docket, influence of narcotics, unconsciousness, unavailability, together with other factors, the refusal of witnesses to give statements, and the lack of represen-

tation, have all been held to be factors that are considered in determining good cause. Having established the outline as to what is good cause, it may be helpful to indicate a number of the situations in which the courts have held that good cause was not shown.

In *Molloy v. Trawler Flying Cloud, Inc.*, 10 F.R.D. 158, (U. S. D. C., D. Mass., 1950) plaintiff filed a motion to inspect a statement given by plaintiff to defendant's attorney in the office of the attorney. The court, in overruling the motion, pointed out that plaintiff knew he was in a law office, he knew he was being interviewed by an attorney, the completed statement was read back to him, and plaintiff had full knowledge of all that transpired and therefore there was no showing of good cause.

Where plaintiff obtains the names of witnesses to an accident, and has statements from them, it has been held that there is no good cause shown so as to merit production of copies of statements given by these witnesses to the defendant. *Bonefond v. Borden Co.*, 12 F.R.D. 183 (U. S. D. C., S.D. N.Y., 1952). The court pointed out, however, that if plaintiff was unable to take the depositions of these witnesses, he could later move for production of their statements given to defendant if he were able to show good cause at that time.

In the case in which the original plaintiff in an action for double indemnity under a life insurance policy had died, and interrogatories were filed stating that the executrix of the plaintiff was denied logical sources of information and could not properly prepare for trial, it has been held that this was insufficient showing of good cause so as to merit production of information in the hands of defendant insurer. *Cunningham v. Mutual Life Ins. Co. of N. Y. et al*, 11 F.R.D. 331 (U. S. D. C., E.D. N.Y., 1951). The court pointed out that no executrix of plaintiff was named in the motion or affidavit, and that the logical sources of information had not been identified. The court held that all plaintiff had shown was a lively curiosity on the part of the attorneys in charge.

Where plaintiff claims that because of a lapse of time between the time of filing the motion to produce and the time of giving a statement, and because of his physical condition at the time his statement was given, he is unable to remember what was said, it has been held that he failed to show good cause for the production of the statement. *Raudenbush v. Reading Co.*, 9 F.R.D. 670 (U. S. D. C., E.D. Pa., 1950). Here plaintiff was seeking to obtain a copy of a statement he had given to a claims agent for defendant approximately one month after the accident while he was still confined to the hospital. The court pointed out that the only actual reason that could be assigned for production of the document was fear of plaintiff's attorney that the testimony of plaintiff on trial might differ from that which was given to the claim agent soon after the accident. The court recognized the value that any discrepancy would have as to cross-examination and discrediting the testimony of plaintiff. Nevertheless the court held that this was not good cause for obtaining the statement.

An affirmative duty to show good cause is cast upon a party moving under Rule 34 for the production of documents or objects for inspection, copying or photographing. It has been held in opinions by the Courts of Appeal that it is not the duty of the court to search out good cause for the production of the documents or objects, *Martin v. Capital Transit Co.*, 170 Fed. 2d 811, (U. S. C. C. A., D.C., 1948). In that case plaintiff moved for the production of a written report made by defendant's driver, stating that the report had been made in the regular course of defendant's business, and that demand had been made on defendant for production of the report and refused. Because there were no recitations indicating good cause either in the motion or the supporting affidavit, the court refused to allow production. This decision was followed in *Safeway Stores, Inc. v. Reynolds*, 176 F. 2d 476 (U. S. C. C. A., D.C., 1949) where plaintiff filed a motion under Rule 34 for production of a statement given by him to an attorney for the insurer of the defendant two weeks after the accident. The motion was sustained by the District Court but the Circuit Court reversed and remanded. The only showing of good cause in plaintiff's motion was that plaintiff was not represented by counsel at the time the statement was given. The court rejected this as constituting good cause.

The determination of good cause is always dependent upon the facts in any given case. It is important, however, to know the general trends as to what amounts to a showing of good cause. It behooves de-

fendants' attorneys to keep abreast of the opinions defining good cause, as an argument that good cause has not been shown is one of the most fruitful methods in defending against plaintiff's attempts to obtain information from our files. In addition, defendant in making use of the discovery procedures and in attempting to obtain the information in the possession of plaintiff must make an affirmative and positive showing of good cause either in the motion to produce or in the supporting affidavit, and the defendants' attorneys should be ever alert to discover new factual situations which will make possible the discovery of information in the hands of plaintiffs' attorneys.

III.

Discovery Through Deposition of Attorney or Claim Agent

It was the opinion of this committee that it would be well to briefly examine a number of the cases in which attempts were made to take the deposition of the attorney or claim agent representing the defendant, together with service of a subpoena *duces tecum* ordering such person to bring with him the file concerning the accident in question. The majority opinion of Mr. Justice Murphy in *Hickman v. Taylor* suggested that as plaintiff was unable to secure the documents sought under Rules 33 and 34 of the Federal Rules of Civil Procedure, that "his only recourse was to take Fortenbaugh's deposition under Rule 26 and to attempt to force Fortenbaugh to produce the material by use of a subpoena *duces tecum* in accordance with Rule 45." This suggestion provided a new technique which was rapidly seized upon by attorneys, and in recent years there have been numerous attempts to delve into the contents of defendant's files by taking the deposition either of defendant's attorney or of a claim agent, with a subpoena *duces tecum* directing such person to bring with them the file. At first blush it would seem that this method would enable an attorney to discover what he wished in the file of his opponent. It is reassuring to note, however, that in every reported case that has been found, the courts have been careful to place qualifications around the procedure, and in all instances the subpoena has been quashed and production of the file was not required, even in those cases where the depositions were permitted.

It is interesting that in each case the court points out that no immunity is created because the person to be examined is an attorney, and that information which is not privileged can be secured by such method. While there is no unanimity among the courts as to the reasons assigned for refusing to allow depositions together with production of the file, the holdings indicate a reluctance on the part of the courts to force attorneys to divulge their private file to the opposing parties, and the courts seem to go to some length to devise reasons for defeating such attempts.

One court has indicated that where the records might be in another state, and there is no positive showing that the documents are in the actual possession of the attorney, the subpoena will be vacated. *Jenkins v. Pennsylvania R. Co.*, 9 F.R.D. 297 (U. S. D. C., E.D. N.Y., 1949). Plaintiff in that case sought to take the deposition of defendant's lawyer, and to obtain the claim and legal file containing statements and any medical reports and hospital records, and payroll records relating to plaintiff. The court observes that if the attorney knew who had charge of the documents sought, he might give the name of such person to those seeking the information. Any statement not privileged could be made available. The court relied heavily on the opinion of *Hickman v. Taylor* in vacating the subpoena.

A subpoena *duces tecum* was also vacated in *Goldberg v. Travelers Fire Insurance Co.*, 11 F.R.D. 566 (U. S. D. C., W.D. N.Y., 1950) where plaintiff moved to take the deposition of one of defendant's attorneys, and served a subpoena *duces tecum* requiring that all books, papers, records, reports, data and investigation be produced. The court acted to protect the files and mental processes of lawyers, and condemned fishing expeditions in the following statement which appears at Page 568:

> "As to the examination of Mr. Dickinson. It was not contemplated under the rule that all the files and mental processes of lawyers were thereby opened to a free scrutiny of their adversaries. *Sunday v. Gas Service Co.*, D.C., 10 F.R.D. 185. While it is essential that there should be knowledge of relevant facts, nevertheless the courts are not to be used to promote fishing expeditions. An attorney for a party is surrounded by a cloak of privilege and may avail himself of that protection. In other

words, Mr. Dickinson can properly be a witness at an examination, with due regard to his relationship of attorney and client."

While these cases indicate an attorney can properly be a witness, if due attention is paid to the attorney-client privilege, only one case has been found which actually sustains a notice to take a deposition. *Sagorsky et al v. Malyon* (U. S. D. C., S.D. N.Y., 1952) 12 F.R.D. 486. The court was careful to state that the notice would be sustained subject to the right of the attorney to claim the attorney-client privilege during the course of the examination, and a subpoena *duces tecum* requiring the attorney to produce the statements of witnesses and other memoranda and reports was vacated, as good cause had not been shown. Defendant was directed to serve a list of all witnesses on plaintiff's attorney, and if the witnesses could not be contacted, plaintiff might later show good cause for the production of the statements in defendant's possession.

The situation was reversed in *Brush v. Harkins,* 9 F.R.D. 681 (U. S. D. C., S.D. Mo. W.D., 1950) as defendant attempted to take plaintiff's attorney's deposition, together with subpoena directing plaintiff's attorney to bring in certain items from his file. The motion to quash the subpoena was sustained. The court felt that an attorney should not be called upon to give testimony against his client.

While the above cases have all dealt with attorneys, the same general rule has been applied to attempts to obtain similar information from claim representatives. In the case of *Overly et al v. Hall-Neal Furnace Co., Inc.,* 12 F.R.D. 112 (U. S. D. C., N.D. Ohio, W.D., 1951) plaintiff sought to take the deposition of a claims manager, and directed a subpoena to him requiring that he bring all documents, papers, records, photographs and other instruments concerning the collision in question. Defendant had previously given the names of some 15 witnesses in answer to interrogatories filed by plaintiff. The motion to quash the subpoena was sustained, and the court relied heavily on the fact that there was no showing that plaintiff had attempted to interview the witnesses disclosed by defendant. The court placed great value on the diligence of attorneys and stated (l.c. 114):

"The Court is unwilling to encourage a practice of this kind by overruling the motions of the defendant, because there is no showing up to this point that plaintiffs cannot discover, through their own diligence, the results which they are evidently attempting to attain by making use of the work product of the defendant. Diligence upon the part of both parties to a suit ought to be encouraged rather than discouraged."

The court holds that plaintiff could file a motion showing good cause for the production of any documents or photographs needed, and that if the articles were not privileged they should be produced.

An investigator for a firm of insurance adjusters was the object of plaintiff's use of the deposition-subpoena technique in *Floe v. Plowden,* 10 F.R.D. 504 (U. S. D. C., E.D. S.C., 1950). After indicating that the information gathered by the investigator would not be considered under the attorney-client relationship, the court allowed the deposition, but placed careful restrictions on the scope of the examination. The court did not wish to allow plaintiff to obtain the services of an investigator paid for by the defendant and reap all the benefit of such work. The court ruled the investigator could testify as to what he did, and what he saw at the place of collision, the condition of the colliding vehicles, the condition of the roadway, character of pavement, location of ditches, side roads, curves, elevation and any other physical facts; he could be required to produce photographs of any of these or other pertinent things; he could be required to state what persons were interviewed, and give their names and addresses. But the court felt that documents or statements should be sought by interrogatories and the other methods of discovery. The investigator should not be required to bring the file and open it to the inspection of the plaintiff, except as he wished to use the file to refresh his memory in being definite and positive in answering the questions.

In one further instance plaintiff sought to go even further and to take the deposition of a court reporter who took shorthand notes while defendant's attorney questioned plaintiff in a hospital. This request was denied, but the court indicated that as the statement was taken in the hospital while plaintiff was not yet represented by counsel, plaintiff would be entitled to inspect his statement. The state-

ment had not been adequately identified, however, and good cause had not been shown. *Goldner v. Chicago N. W. Ry. System,* 13 F.R.D. 326 (U. S. D. C., N.D. Ill. E.D., 1952).

Thus, in all of the above decisions where plaintiff has attempted to take the deposition of defendant's attorney, or of a claim agent representing defendant, while the right to take the deposition might be upheld, subject to considerable restrictions imposed by the court, in every instance the court has vacated the subpoena *duces tecum* with which plaintiff sought to delve into defendant's file.

While the deposition-subpoena technique suggested by Mr. Justice Murphy in the majority opinion in *Hickman v. Taylor* has frightening possibilities, the courts have been quite conservative in handling the attempts to utilize this procedure. Depositions have been allowed to be taken only under closely restricted circumstances, and the subpoena *duces tecum* has not yet been allowed. Nevertheless this technique offers plaintiff's counsel a weapon to hold as a constant threat against our clients and it behooves defense counsel to be constantly on the alert to ward off such efforts.

IV.
Novel Defensive Tactics

While the courts liberally interpret the discovery rules, and in many instances permit plaintiff's counsel to delve much deeper into defendant's files than we might wish, there are a few decisions wherein novel defensive tactics have been sustained. A few such decisions will be briefly noted. In the case of *Knab et al v. Pennsylvania R. Co.,* 12 F.R.D. 106 (U. S. D. C., W.D. Pa., 1952), an interrogatory asked the manner in which the accident occurred. Defendant answered that the statements of witnesses were conflicting, and the court ruled that no more definite answer was necessary other than a listing of the names of the witnesses. In the case of *McCord et al v. Atlantic Coast Line R. Co.,* 185 Fed. 2d 603, (U. S. C. C. A., 5th Cir., 1950), a defendant corporation was not required to answer interrogatories concerning details of a collision, as they were not facts within the corporation's knowledge but within the knowledge of the train crew.

A question of grave importance to defense attorneys is whether or not plaintiff can compel the disclosure of the insurance coverage of defendant. Two District Court decisions have held that plaintiff may do so. *Orgel v. McCurdy et al,* 8 F.R.D. 585 (U. S. D. C., S.D. N.Y., 1948); *Brackett v. Woodall Food Products, Inc.,* 12 F.R.D. 4 (U. S. D. C., E.D. Tenn., S.D., 1951). The *Orgel case* held that plaintiff could require defendant's office manager to testify as to insurance coverage when his deposition was being taken. The court felt that the information was generally relevant to the issues in the case. The *Brackett case* held that plaintiff would have the right to inspect the insurance policies of defendant and copy or photograph them under the provisions of Rule 34. In this case the court refers to the trend of the states in adopting financial responsibility laws and cites the specific Tennessee statutes. The court points out that such laws require the defendant to disclose to state authorities information concerning insurance and that this would then be a matter of public record. The court holds that this information is material in the preparation of the case for trial and that plaintiff is entitled to this coverage information.

A recent decision has reached a contrary conclusion, much to the relief of insurance counsel. *McClure v. Boeger* (Frederick, third party defendant) 105 F. Supp. 612 (U. S. D. C., E.D. Pa., 1952). In that case plaintiff also filed a motion under Rule 34 for the production of defendant's liability insurance policy. The only good cause shown in the affidavit was that the provisions of the policy "may afford the plaintiff rights of which she would otherwise not be able to avail herself." The Brackett decision was cited. The court here pointed out that plaintiff would not have direct rights in the policy other than where medical payment provisions might exist. While there might be advantages to plaintiff knowing the extent of defendant's insurance coverage, the court felt that the disclosure should not be made and the motion was denied. The court says (l.c. 613):

> "Of course, the fact that the information would not be relevant and that the fact of liability insurance could not be introduced at the trial does not necessarily forbid discovery, but whatever advantages the plaintiff might gain are not advantages which have anything to do with his presentation of his case at trial and do not lead to disclosure of the kind of information which is the objective of

discovery procedure. I think that to grant this motion would be to unreasonably extend that procedure beyond its normal scope and would not be justified."

Thus the most recent decision on this question has held that defendant is not required to disclose information regarding his insurance coverage. Because of the two earlier decisions on this question, plaintiffs will undoubtedly be making efforts to obtain this information and defense counsel must anticipate and prepare for this contingency.

V.

CONCLUSION

It is the finding of this committee on Practice and Procedure, after examining the decisions of the Federal Courts for the past few years relating to use of discovery, that while these procedures have primarily been a weapon in the hands of plaintiffs, defense counsel are awakening to the possibilities of using these rules for the benefit of the defendants. The reported cases indicate an increasing use of the discovery procedures by defendants, and reveal an increasing understanding on the part of defense counsel as to the information that may be obtained. We can all use these simple and inexpensive methods to obtain more detailed information as to the basis for plaintiff's claim, information concerning the extent of the damages that are sought, and any documents, photographs or objects in the possession of plaintiff having bearing on the litigation.

The definition of "good cause" under Rule 34 is undergoing constant change as the courts consider new and differing factual situations. Careful attention to new decisions on this question is required in order to properly make use of this method of discovery.

While it was at first feared that the suggestion made in *Hickman v. Taylor* concerning the taking of attorneys' depositions, coupled with the subpoena *duces tecum* requiring production of the file would open wide the flood gates and would lay bare defendant's files to rapacious plaintiffs' attorneys, the actual experience has not borne out such fears. The courts have been quite conservative in allowing this technique to be used. In some cases depositions have been allowed but in no case that we have found has the subpoena *duces tecum* been sustained.

Discovery under the Federal Rules is a subject that is being constantly explored and developed. The Federal Rules have been in use a relatively short time, and the confusion caused by the *Hickman v. Taylor* decision has prevented a thorough and complete understanding of the problems and possibilities presented by these new techniques. It is the feeling of this committee that the discovery procedures present valuable opportunities to defendants' attorneys for inexpensively and thoroughly developing the nature and possibility of plaintiff's case at an early stage in the litigation. While defendants' attorneys have been somewhat slow to utilize the discovery procedures to their advantage, the indications from the reported cases are that the defendants are becoming more familiar with these techniques, and are making increasing use of interrogatories and motions to produce objects and documents. Further attention to the problems created by the Federal Discovery methods will enable defendants' attorneys to more effectively prepare their cases, and more thoroughly serve the interests of their clients.

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Report of Workmen's Compensation Committee

The Doctor, the Lawyer and the Compensation Case

SO important is our subject that it might profitably be addressed to the doctor as well as to the lawyer. If the attitude and performance of the doctor before and at the trial is apt to make the lawyer boil over occasionally, just as often does the doctor seethe at the lack of understanding and the lack of explanation by the lawyer. It is certainly not within our province to suggest to the medical practitioner how to conduct an examination or reach a diagnosis. But the continual absence of vital medical information in compensation files delivered to defense attorneys compels the conclusion that the industrial physician should be repeatedly reminded that he is the key figure and in a unique position to obtain essential facts.

On the field of compensation litigation, the doctor plays many important positions. He has responsibility for treatment, evaluation of disability, assistance in pre-trial conferences, and expert testimony. As a team-mate, he may exceed expectation or completely frustrate the attorney.

When a controverted compensation claim reaches the lawyer, the medical issues have usually crystallized—for better or for worse. The conscientious lawyer must give thought to a basic medical procedure in these cases which will assure for the insurance carrier and the attorney effective assistance by the doctor. Our effort (in cooperation with the carrier and the employer) should be directed toward the elimination of needless jeopardy of a client's defense before the lawyer starts.

Your Committee has explored this interesting but difficult area of forensic medicine. The contribution by members of much time and thought has resulted in a report which should be a challenge to the lawyer.

The establishing of helpful procedures in the examination and treatment of injured employees is the mutual responsibility of the employer, the carrier, the lawyer, and the doctor. The fault too often lies not in the doctor but in the lawyer; and we must admit our guilt of failure to inform our medical friends of what we need of them. The lawyer representing defendants under the widely divergent compensation laws of our nation must take the initiative to the end that this type of litigation is properly handled. To accomplish this, the medical evidence must be adequate. We believe that this explantion of our need, based on the experiences of trial attorneys, should be beneficial as a starting point in our effort of cooperation.

The Treating Doctor

The defendant theoretically has an advantage in most jurisdictions because the major portion of the examination and treatment (an excellent basis for medical testimony) comes from its own doctors. Thus, when the cost of a case is greatly increased through the carelessness or lack of help of the man who should be best qualified to assist, the distress of the lawyer and client is easily understood. This initial advantage is frequently lost because some physicians on the panels of industrial concerns are not sufficiently trained in all aspects of compensation so as to enable them to play all the roles assigned to them. It follows therefore that many are not well qualified to appear as witnesses in defendant's behalf.

Selection of the attending physician should not be left to chance. Industrial surgery requires skill, understanding, fairness, and cooperation. But in addition, the doctor choosing industrial work should understand how his own workmen's compensation law operates so he can appreciate legal issues and prepare for them. He should constantly bear in mind that benefits are payable only for disabilities caused by injuries arising out of and during the course of employment. The industrial surgeon should be thoroughly familiar with the lawyer's problems of causal relationship, questions of liability, and exaggeration of disability. His conception of the liberality with which workmen's compensation acts are construed should be sufficiently accurate so that he will not wrongfully disregard every question as to causal relationship and disability.

Then, after a competent treating doctor has been selected, the attorney and the adjuster must assume the responsibility of helping him learn the medico-legal phases of his work. Here the lawyer has failed.

The Treating Period: The Initial Examination

The percentage of industrial injuries resulting in litigation is indeed small. Clearly, the lawyer cannot expect the doctor to view with alarm each minor injury and treat it as if it were a potential lawsuit. But the lawyer can reasonably expect his medico-legal partner to familiarize himself with the types of cases which might result in litigation and to take the precautions necessary when the first symptoms of "litigationitis" appear.

The attending physician must ordinarily exercise immediate and therefore independent judgment regarding the scope of the initial examination. In simple cuts, fractures, bruises, and strains, no more than a simple history and examination is indicated. In back and head injuries, cases involving extraneous complications (such as tuberculosis, diabetes, and the multitude of afflictions of the body which are not ordinarily caused by trauma), and claims involving neurosis, malingering, and exaggeration, a complete history and examination are mandatory. In doubtful or involved cases, the attending physician should freely consult with the lawyer or adjuster. Except in emergencies, the doctor should advise with him before calling in specialists; this will save time and misunderstandings for all.

If the doctor suspects misrepresentation, he should feel free to call on the carrier or employer for investigation of the injury alleged or of activities and for information regarding past history.

The first attending physician has a most important role. He should recognize that he is the source of original information. Being in command, he is responsible for correct diagnosis and the choice of treatment which will result in a recovery with a minimum of temporary and permanent disability. His opinion on causal relationship frequently carries more weight than that of a specialist called in for pre-trial examination. He obtains, and has the opportunity to study and evaluate during the healing period, the factors entering into disability evaluation.

The History

Since the average patient talks freely to the first treating doctor, he can usually obtain the complete story, especially if he wins the confidence of the patient by a manifestation of interest. The first attending physician should elicit and immediately record a sufficient history both of the accident alleged and the patient. In every case he should obtain an accurate (even if brief) statement of the facts which throw light upon responsibility for the injury. When he perceives the storm signals of trouble, he should increase the diligence of his questioning to suit the apparent potential danger of the claim.

The conscientious treating doctor assumes a dual responsibility in obtaining a complete history: to the injured employee, for proper diagnosis and adequate treatment; to the employer and carrier, for accurate appraisal of causal relationship to the injury alleged and of factors unrelated to the injury which may affect liability or disability. The history obtained at the first visit often includes facts which materially influence the ultimate outcome.

Concerning how the injury was sustained, the doctor should find out where the man was working and what he was doing. All of the telltale details are important: the magnitude of force alleged, body positions, assistance by fellow employees, appearance and type of injury and *probability of its being caused as alleged.* In cases which seemingly involve fraud, the first treating doctor should feel a responsibility for obtaining an exact description of the circumstances of injury, even the names of witnesses, so that the attorney and adjuster will have a starting point for investigation.

Inquiry should always be made concerning the immediate effects of the accident and whether there was even a slight period of unconsciousness.

An adequate history should obviously include a description of pre-existing diseases and prior injuries and pertinent personal information regarding the patient, such as economic status and his working and home environment. The first attending physician should always consider whether there are present, conditions attributable to age, environment, and non-occupational exposures (such as alcohol, drugs, unhappy family life). Extreme care must be exercised in evaluating such fac-

tors in relation to effect on recovery and residual disability, so a record of them is vital.

While recording the history, the physician has an excellent opportunity to observe the patient's personality and may gain valuable information in cases of neurosis, malingering, or exaggeration. Failure to obtain and record adequate history has been responsible for irreparable damage when claims resulted in suits.

The Physical Examination

A competent examination should be a continuation of a recording of the history. Not only the physical but also the mental involvements should be studied. The doctor should observe and inquire regarding abnormalities due to previous injury or disease which the injured employee did not mention. X-rays and laboratory tests should be made when necessary to confirm or refute the claim that the injury was caused by the accident in question. The doctor in this respect is the "medical investigator."

The clinical examination should not be limited to the part of the body claimed to be damaged. When the injury involves an upper extremity, the patient should be made to strip to the waist, and if the lower extremity is injured, it is advisable to have the patient completely undress so that his posture and locomotion can be observed.

The physician should watch the patient in the act of undressing for the examination to discover expressions of pain or movements which are inconsistent with the amount of pain claimed and are unconscious admissions against interest.

In workmen's compensation cases, special attention should be given to objective data which can be used for comparison in future examinations and in evaluating the extent of permanent disability. For example, in injuries to upper and lower extremities, exact measurements should be taken of circumferences at various levels, of motion possible, and of strength. The taking and recording of such measurements may render quite valuable what otherwise might be a superficial examination. If the examiner acquires and follows a set routine in taking such measurements at regular intervals, he will have a simple but objective record of the development in his patient's physical condition from the time of the first examination.

During the course of the examination the physician has an excellent opportunity to note pathological findings which are independent of the present injury, such as the sequelae of previous injuries, abnormalities, diseases of the heart and of the central nervous system. All physical defects other than those caused by the present injury should be observed. Further inquiry should be made relative to previous diseases, accidents, and disabilities discovered in the course of examination. Otherwise, some previous injury may be brought in as evidence of present injury, or some future development may be the result of a part injury or disease and yet claim be made that it developed from present injury.

By now the physician should have gained a definite impression of the personality of the injured workman and a clear picture of the nature and extent of the injury. When the physician is ready to summarize his clinical findings, he must always consider subjective complaints in relation to the facts of the accident. Physicians are often quick to accept the injured workman's viewpoint regarding causal relationship without a critical examination of the facts.

Experience also shows that often by the time the workman reaches a physician he is able to explain his complaints arising from a non-traumatic condition with a more or less definite history of accident. Although it is the attending physician's first duty to treat the injured workman, the industrial physician, by his participation in workmen's compensation cases, owes a duty to industry, and therefore must exercise extreme care in determining the causal relationship between the alleged injury and the condition found upon examination.

The Diagnosis

The next problem of the attending physician, therefore, is to determine whether the condition disclosed by his examination can be attributed to the alleged trauma. Careful diagnosis becomes of particular importance in workmen's compensation matters: unless a correct diagnosis is made by the first attending physician, his effectiveness as a witness will be greatly impaired. How many times are attorneys trapped by their own doctors who have made a careless or incorrect diagnosis, or one so superficial that they saw only the outward result and not the real cause!

A full history and a thorough physical examination should lead to an accurate diagnosis. If the attending doctor is not able to make the diagnosis, now is the time for him to call in whatever assistance he feels is needed. If he delays, it is frequently too late, for where the claimant has been treated by the defendant's own panel of doctors and the defendant later requests that he be seen by a specialist, many courts do not allow further examination.

In determining the traumatic or non-traumatic nature of the pathology found, consideration must always be given to the questions of aggravation, activation, and acceleration of pre-existing dormant or inactive conditions. A complete diagnostic survey is necessary in any case which may result in a trial, frequently not as much from a medical as from a medico-legal standpoint.

Absent knee jerks and lack of coordination may suggest the need of a Wassermann test and a complete neurological examination to support persuasive testimony on the witness stand. The industrial physician should consider the problem of diagnosis and the proof necessary to support his opinion not only from the standpoint of medicine but also from the position of a doctor confronted with a medico-legal problem which must be explained convincingly to a jury or commission. When a doctor is in doubt regarding the scope of tests necessary to confirm a diagnosis, he should freely consult with the attorney.

The attending physician is often the only one in a position to establish an exact diagnosis based on the symptoms attributed to the alleged accident, and the passage of time may render an exact diagnosis increasingly difficult. For example, in a dislocation of a shoulder, the first attending physician can usually determine from symptoms and examination whether he is dealing with an original traumatic dislocation or with a recurrent dislocation. If a claim is made months later for permanent disability, a correct initial diagnosis (with supporting data) that the dislocation was recurrent rather than original would be of great value to the defense. In a case involving low back pain, a conscientious examiner may confirm or exclude a recent injury to the spine by determining with aid of x-rays the bony changes present at the time of the accident. (A careful description of such findings is of course necessary. They should be recorded in sufficient detail so that if the physician is called to testify, he can rely with confidence upon his report).

The evaluation of pain often represents an additional problem and deserves special attention in workmen's compensation cases. Since pain is a subjective symptom and therefore incapable of accurate measurement, the expression of pain or unconscious bodily movement is often the only reliable lead in making a diagnosis. Accordingly, the first attending physician should always be on the alert for exaggeration or malingering.

Another problem which should receive special attention at the initial examination is a possible neurosis.

Frequently, and understandably, doctors classify a condition as organic which actually is neurotic. The lawyer is embarrassed by such finding in the trial of the case when it supports plaintiff's contention that it is organic.

The Attending Physician's Report

The treating physician should render a preliminary report covering the initial examination and should follow this with periodic narrative reports. If first aid was administered, the details of treatment should be recorded. Since compensation payments in part take the place of the pay envelope, these reports must be rendered promptly. The employer or the carrier needs these reports for important reasons:

(1) To determine if the injured workman will be disabled a sufficient time to entitle him to the weekly benefits provided by law.

(2) To ascertain the probable length of temporary total disability and the extent of permanent impairment.

(3) To enable the carrier at the earliest possible moment to erect a suitable reserve.

(4) To inform the lawyer of the early or first diagnosis and the progress of the case.

One of the most important functions of a report is the part which it plays in the reserve established on each claim. If a person were building a house and the contractor estimated the cost at $10,000.00, that sum would be made available at the

bank. The financing of a compensation case is similar; the carrier must rely on doctors to furnish estimates of disability and medical reports so that the potential cost of the case can be determined and an adequate reserve maintained.

Lack of details and inaccuracies in the first report frequently are a source of future difficulty involving considerable expense to the employer or carrier, loss of time for claims representatives, and sometimes a lasting grievance on the part of the injured workman. Occasionally a report by the attending physician is so vague (either from lack of knowledge of what is needed or from lack of care in preparation) that it is impossible for the attorney to draw accurate conclusions from it. The uncertainty which such reports create must necessarily be resolved either by supplemental report or by special examination if the attending physician is unable to remove the ambiguity.

The attending physician should set forth his findings as definitely as possible. This does not mean that he should express an opinion on matters outside his field of knowledge. But if he is in fact well qualified to express an opinion, he should state his belief firmly and stand ready to justify it on a logical basis. He should avoid indiscriminate use of "possibly."

The report should be complete yet concise. Simplicity of expression is essential. The medical profession should be encouraged to submit reports which communicate information clearly and unequivocally to persons who have no specialized knowledge of medicine. When the physician unnecessarily sprinkles his report with rare medical and scientific terms, the value of the report is diminished to the extent that the meaning of the physician's message is lost in professional phrases. Facts and opinions are, of course, most comprehensible when set forth in logical sequence.

The insistence by the lawyer that the attending physician furnish carefully prepared and complete initial and supplemental reports and explanation by the lawyer of the importance of these reports should promote a better understanding between the doctor and lawyer. The physician who appreciates that importance will no longer consider the preparation of the medical report an imposition and a dull and uninteresting proceeding: he will know that he is rendering a worthwhile service to his client.

The Healing Period

During the "healing period," it is the rule rather than the exception for the doctor to place the compensation patient under the care of an assistant or a nurse. He should not lose personal touch with the case or neglect to make frequent and comprehensive reports. Only by frequent reports can the doctor and lawyer work together on the medico-legal problems in any serious industrial case.

In subsequent examinations, the patient should be observed to see how far he has become preoccupied with the injury and whether he shows any other mental symptoms. The treating physician should observe the rate of progress toward recovery. If the normal healing period is exceeded, a re-examination would be indicated to determine whether the delay is due to physical or psychogenic factors. One common procedure is for the physician to prescribe different types of therapy, allowing weeks or months to pass without a complete re-evaluation of the treatment necessary. It is often difficult, in trial, to rationalize this treatment with the doctor's conclusions when he does re-evaluate his patient's condition.

A simple rule should be followed in all cases where recovery does not result within a normal time. If re-examination fails to disclose any pathology to account for the delay, the physician should recognize the possibility of a neurosis or malingering, and consult with the attorney or adjuster regarding procedure.

If the attending physician discovers during the course of treatment evidence of the development of a neurosis, he should immediately inform the attorney or adjuster. The industrial surgeon recognizes that the recovery of compensation benefits is an influence on recovery which is not encountered in non-industrial practice. The therapeutic value of lump sum settlements in states where this is permitted must be considered by the treating physician; the final settlement often cures the neurosis. The attending physician should also realize that defending a claim of traumatic neurosis in court is difficult, and should be on the alert for signs which indicate that the condition is simulated rather than real.

The Estimation of Disability

The treating physician is in the best position to make an accurate evaluation of residual disability. He is acquainted with

the injured workman and has his confidence. If he has handled the case expertly from the beginning, he knows more than any other doctor about its progress and what disability should remain. Thus, the attorney has strong reason for desiring that the treating physician be well versed in the principles of estimating permanent disability.

Since the majority of injured workmen desire complete recovery and realize that they cannot be properly treated unless they truthfully state their complaints, the attending physician from the outset not only appraises the physical progress but usually obtains honest complaints. He knows the character and period of treatment, how the complaints of the injured person disappeared or became minimal. He has more evidence to support his final disability evaluation. His estimate should be particularly trustworthy (and more credible of belief by jury, court, or commission) if on the last visit he completes his record as to complaints, limitation of motion, and the necessity for further treatment. At that stage he is still the "treating doctor," and bases his opinion not on one but on many observations.

The physician's report on his evaluation of disability, upon which the lawyer's handling of the case must be based, should summarize the history, examination, and findings which support his conclusions. The doctor should give his opinion on:

(1) Whether the injury alleged is the direct and sole cause of the disability allowed; if not, the extent to which pre-existing or post-injury conditions not due to injury contribute to the disability.
(2) Whether further treatment is necessary; if so, the extent thereof and the probable outcome.
(3) How long before the injury will reach maximum recovery.
(4) The period of further temporary total disability.
(5) The percentage of permanent partial disability and the member involved. (He should state his reasons for allowing this disability).

The lawyer's problem is not confined to the attending physician, but also extends to the doctor who is called in to testify without any previous connection with the case. If a claimant submits himself to examination for the sole purpose of determining his disability, it is only natural that his complaints will be magnified and his difficulties enlarged. Specialists too frequently report no demonstrable physical disability but serious subjective complaints, for which they allow substantial disability. Indeed, if the sole purpose of an examination is disability evaluation, and if the examiner sees the patient only once, lack of uniformity in estimates is not surprising.

It seems incredible, but it is true, that the medical profession has evolved no universally accepted methods of measuring joint motion, strength of grip, and other factors involved in disability ratings. This lack of standard renders the evaluation of disability extremely difficult for a conscientious treating doctor.

For further discussion of a possible standard for evaluation of disability, see Appendix.

The Examination for the Purpose of Testimony

Many a compensation case is won or lost by the defendant by his selection of a doctor to make an examination. It is essential that defendant's counsel have a good understanding of (1) the knowledge and experience of the examiner both as a physician and witness, (2) the probable findings of the examiner, and (3) the purpose of the examination.

The doctor must be one interested sufficiently to give an attorney time for a full conference before the examination; if he is too busy, beware. If his testimony is to be presented to an industrial commission or board, his standing with that body based on general reputation and previous appearances is most important. The doctor must have acquired the art of presenting his testimony understandably and persuasively to the commission, court or jury.

There are many doctors, particularly in the great urban centers, who are in a sense professional medical witnesses and who become either a "plaintiff's" or a "defendant's" doctor. The lawyer can and does use such a witness to the advantage of his client. But the typical medical witness for the defense is the honest "treating doctor" who may be a skilled physician but an untrained witness. So the lawyer is presented with a problem.

After you have selected your doctor, arrange a personal conference with him before he sees the injured workman. Take

your file to his office. You are retaining him, and you are warranted in making some demand on his time. Show him all the reports from your doctors. Take him x-ray pictures for purposes of comparison. Tell him of unusual circumstances surrounding the case, the extent of work the man is able to do, evidence of malingering or exaggeration.

Inform the doctor of prior claims, injuries and diseases. Show him your investigation of the physical facts of the alleged accident. In many cases, as we all know, the facts of the accident demonstrate that the claimant could not have suffered the injury claimed. The examiner must be armed with the truth.

If there has been no complete revelation to the doctor, he can easily overlook or not attach proper significance to the facts and complaints related by the claimant. If this happens, the attorney cannot blame anyone except himself.

During the conference, the attorney should find out the extent of examination which the physician intends to make and the *result to be expected*. Obviously, it is unwise to upset favorable reports by the treating doctor by obtaining a conflicting opinion, yet this constantly happens. It is equally unwise to rely upon the treating doctor's report if it cannot be defended.

Many examinations do the defense more harm than good. An examination intended to strengthen the opinion of the treating doctor brings forth a new and damaging diagnosis. An examiner may believe a well-coached plaintiff and allow a higher percentage of disability. A minor back case grows into a costly disc injury; and the cry is raised for myelograms (which are of extremely doubtful value, when negative, in proving no injury to a jury). Watch out for the doctor who is "hipped" on a particular diagnosis.

After a case is in litigation, and when all evidence indicates that the position being taken is correct, the attorney should not risk the loss of that position by an ill-considered examination. The proper safeguard is to discuss the case with the doctor before arranging for the special examination, and if there be doubt of the wisdom of injecting another doctor into the case, do not gamble.

After the examination, the doctor's report must be discussed with him either personally or over the telephone before it is written. There may be occasion for additions or explanations or further tests and studies before the report is submitted.

The Pre-Trial Conference

When the attorney knows that the case will proceed to trial before a jury (and in most hearings by commissions), an early conference with each medical witness is imperative. One important purpose of counsel is to determine whether his expert is qualified and experienced in testifying, whether he appears to be a learned man of medicine, and whether he has a pleasing and convincing manner. Another objective is to overcome the doctor's reluctance to testify; he should be impressed with his moral responsibility to present the truth to the jury or commission. Most important is the opportunity to exchange ideas and learn what each expects of the other.

From the doctor, the lawyer should get a complete understanding of the injury and the parts of the body affected. He should learn the technical terms involved and the causes of the condition alleged, whether it is reasonably probable that the disability was caused or could be caused by the accident in question. Is there any condition (such as previous injury or disease) present which could cause the same symptoms and complaints? What are the differentiating factors in the diagnosis? Are the plaintiff's complaints those which should be present if he was actually suffering from the injury he alleges? Are there inaccuracies or deficiencies in claimant's history and the physical findings as compared with complaints and findings which should be present in the condition alleged?

Get the doctor to suggest how to frame questions which will elicit the proper facts and opinions. Bring out what you want to highlight in cross-examination of the plaintiff's doctor, and work out the proper approach for both cross-examination of plaintiff's witness and direct examination of the doctor. The attorney should go over his entire file with the doctor in the same way as suggested when arranging for an examination. He should obtain from the doctor references to recognized medical authorities and books which will be helpful in formulating intelligent questions on direct examination and serve as a basis for cross-examination of opposing medical witnesses.

A full discussion should enable the doctor and the attorney to formulate whatever theories of defense may be available and

to develop teamwork in presenting the defendant's case.

The lawyer can often learn what medical theories the opposing witness is likely to advance and why those theories are fallacious. Some opposing medical witnesses are on the sly side when cross-examined, if they are aware counsel is not informed of the accepted medical theory, but when confronted with sharp intelligent questioning, the witness is more likely to adhere to the accepted and approved medical opinions.

To the doctor, the lawyer should explain that the medical witness is placed on the stand for the purpose of *persuasion*. To be effective, he must convince the jury that he is well versed in the science of medicine and knows the subject on which he is testifying, that he is familiar with the facts involved in the controversy, that he is a man of honesty and integrity and believes in fair play, and that he is not testifying for or against anyone but is merely making the facts and opinions in his possession available to the jury. *Emphasize that the doctor is a key witness.* Caution him that under no circumstances should he show signs of anger, bias, or discourtesy.

Medicine is an extremely broad but not an exact science. Inconsistent medical opinions abound. The reluctance of the average doctor to testify grows partly out of the fear that he will be made to look ridiculous. In the pre-trial conference, proper explanation should be made that failure to stand by an opinion is usually the cause of the doctor's difficulty. Before he gets on the stand, the doctor should consider all possible medical theories involved in the case, weigh them, resolve conflicts, and reach a final opinion, by which he should stand resolutely. Many doctors know that a certain condition could not be due to trauma but they will give lip service to a "mere possibility" of causal relationship under the mistaken belief that the admission of a remote possibility is a more scientific approach. These small deviations can be built into major discrepancies which make the doctor appear ridiculous. When a hypothetical or other question does warrant an it-is-possible answer at variance with conclusions previously expressed, the doctor should add that he adheres to his original opinion regarding the case in trial. Tell the doctor that a court may direct him to answer a certain question "Yes" or "No." But the doctor always has the right to explain his answer and can reiterate and strengthen the position previously taken. Caution the doctor not to be drawn into speculation by opposing counsel.

If the doctor is asked whether he is being paid for his services, he should readily acknowledge employment and state that he owes an obligation to appear in court and make his views known to the jury, that it is a part of his professional duties to testify in court, and that he charges a fee therefor as for all professional services.

The lawyer should read or summarize the plaintiff's petition and discuss the allegations. Inform the doctor of the questions involved in the litigation and the effect of his testimony on determining these questions. Discuss the possibility of using demonstrative evidence such as pictures, skeletons, models. Go over the hospital records.

Caution the doctor about bringing his office notes to the witness stand. He should take sufficient time to read his record and to memorize the facts. If he uses his records in court, opposing counsel may request that they be submitted for inspection. Casual entries at variance with the doctor's expressed opinion can cause endless difficulty.

The doctor should seek simplicity of expression and should strive for graphic examples. If he has had little experience in testifying regarding disability, help him find a sound explanation for his estimates. Explain to him the tricks of opposing counsel and how to handle himself. Even if the doctor is profoundly erudite, try to get him to act like an average human being on the stand.

At this conference the attorney may have his views on extent of disability or causal relationship between the alleged injury and the disability modified by his witness. Most cases in litigation are settled in that period just before trial, often because of last-minute discoveries. If the client is made aware of the probability of adverse decision and nevertheless desires to continue with trial, counsel is then spared the embarrassment of attempting an alibi for an adverse verdict.

Examination of Medical Witnesses: Cross-Examination

In cross-examining the plaintiff's medical witness, it is advisable to have defendant's medical witness present at the time

of your examination (if possible), if only for the psychological effect. Most medical witnesses are proud of their intellectual and scientific integrity.

Before attempting to cross-examine an expert, the lawyer must be thoroughly informed. Many medical experts are trained in defending their opinions from assault by the cross-examiner. Beware of an extensive cross-examination of a well qualified expert, unless some specific useful purpose can be served.

Technical terms which may be used by experts should be thoroughly understood by the cross-examiner. Often the effectiveness of an expert's opinion can be seriously weakened by demonstrating on cross-examination that the learned jargon used in describing a disorder of the plaintiff, when reduced to simple equivalents, merely describes a common ailment thoroughly understood by a court or jury and of little disabling effect.

Another weapon of attack on a medical expert's opinion is by the use of the writings of recognized medical authorities. Have the witness recognize a writer as an authority, and then have him read a passage from the writer's work which is contrary to the witness' opinion. Have several books out on the table where the witness can see them.

An attitude of fairness toward opposing medical witnesses usually obtains more favorable results than if an attempt is made to abuse the witness. Although defendant's counsel should depend on his own medical witness to establish his theory of the case, the opposing medical witness should be persuaded, if possible, by respectful maneuvering, to agree with some parts of defendant's theory.

When an opposing medical witness testifies from a report or notes, the cross-examiner should obtain them from him for inspection. Perhaps the report contains a notation of facts of which he has not testified, which may be favorable to defendant's theory. He may have obtained a history from the plaintiff which is material to the defense. Establishing a part of the defense from records of plaintiff's medical witness is most effective.

Every defense attorney is familiar with procedures for attacking the integrity of professional testifiers. These should be used only in flagrant cases, but if they are put in operation, the attack should be with full force.

Examination of Medical Witnesses: Direct Examination

Medical experts are of two general classifications, the attending physician and the expert who examined the plaintiff for the purpose of testifying. The attending physician may testify as to subjective symptoms, to the patient's history, to pain and suffering at the time of the examination. The physician who examined the plaintiff solely for the purpose of testifying must ordinarily limit his testimony to what his examination reveals and is not permitted to testify about statements made during the examination. This does not preclude the examining physician from testifying about exclamations of pain during the examination.

When a medical witness takes the stand, counsel's first concern should be to emphasize his qualifications, training and experience on matters then under discussion.

Testimony of defendant's witness should be couched in simple and understandable language. This will prevent the cross-examiner from attempting to establish that the technical medical phrases used, when reduced to simple language, represent a serious disorder.

The attending physician should testify in detail about the period of treatment and his observations of the progress of the plaintiff.

The doctor's reasons for his opinion should be fully and clearly set forth. A reasonable explanation based on experience of the average person is the most effective manner of presenting medical proof. For example, a defense medical witness testified that, in his opinion, a sarcoma of the tibia was not causally related to a single bump which did not produce a break in the skin, discoloration or other objective signs; if the opposite were true, few people would live beyond childhood, when the extremities are constantly subjected to bumps and cuts. An estimate of disability is much more likely to be accepted by a commission or jury if the doctor explains in detail how he arrived at it.

During the trial, keep in mind that a "bad" settlement is often better than a "good" lawsuit, especially if the "good" lawsuit begins to go sour because of defects in medical evidence.

A word about depositions of medical witnesses. It is usually much better to have the doctor present to give his testimony

in person. Reading a deposition is usually difficult for the judge, jury, or commissioner. They are not impressed with depositions; occasionally the reporter has had difficulty taking medical testimony and transcribing it. However, if the witness cannot attend trial, his deposition should be taken if for no other reason than to get a favorable history to aid in your theory of defense, and to make a good record for appeal where all testimony takes on the same form.

The use of depositions of opposing medical witnesses by industrious lawyers is on the increase, not only to learn more about the other side of the case but to commit experts to their facts and theories of disability. In death cases, where the deceased employee shows no evidence of injury, it is well to determine the opinions of the opposing medical experts as to the cause of the employee's death and the theory on which the opinion is based. This affords the defense attorney an opportunity to have the depositions reviewed by experts to determine if the theory given in the deposition is sound.

It is not uncommon in opinions of the court to find expressions such as "where medical experts express conflicting opinions regarding the capabilities of a plaintiff to return to the duties of his occupation, courts are sometimes guided by the testimony given by lay witnesses, and such testimony is to be given consideration along with all facts and circumstances disclosed by the record." *Otis v. Board of Commissioners of Port of New Orleans,* 62 So. 2d 866 is an example.

CONCLUSION

Your Committee suggests, in closing, that the lawyer owes to the doctor engaged in industrial work the duty of assisting him in the study of this field of medical practice. The lawyer should welcome opportunities to write articles for medical journals, address medical conventions and societies, and discuss specific problems with doctors. The lawyer can help in formulating uniform standards for disability evaluation. He should cooperate with medical societies in their efforts to stamp out fraudulent medical testimony. In striving to attain the goal of a fair administration of workmen's compensation laws, the lawyer will help both the medical and the legal professions.

Appendix: Methods of Evaluation of Permanent Disability

In the workmen's compensation field, the rating of permanent disabilities is one of the most controversial topics; the need for some standard of evaluation is most vital.

"Permanent disability" may be defined as the final residual damage or loss of use, after all medical and surgical procedures have been instituted and after sufficient time has elapsed to obtain the maximum recovery. Too often do we find gross discrepancies between the opinions of medical men in the same case as to the extent of permanent disability. As a general rule, this emphasizes unfamiliarity with the subject rather than an intention to exaggerate or minimize. The explanation may largely be found in the lack of a standard method or basis for evaluation of permanent disability.

A review of the compensation laws of the various states discloses a fair degree of uniformity in the benefits allowed as to type and degree of disabilities. However, although these schedules arbitrarily fix the amount or period of compensation for a specific disability involving total loss of a member, no principles are laid down and no criteria are established to guide the doctor in estimating partial disabilities (*less* than 100%), which form by far the greater number of all disabilities.

Since no common standard of comparative values between different disabilities has been accepted, it is not strange that awards for similar conditions vary greatly, not only in different states but in the same state. Thus, injustice is done to the injured workman, to the self-insured or insurance carrier, and to society in general. The insurance carrier cannot set up trustworthy reserves on claims. The injured workman receives too much or too little; he may hear of another injured employee's receiving much more for the same injury and naturally feels that a great injustice has been done to him. Such inequality brings discredit upon the administration of the workmen's compensation laws.

The lack of a common denominator in estimating permanent disability has given rise to the idea that it is impossible to determine accurately the percentage of permanent disability. However, it should be possible for physicians (with the aid of all interested parties) to adopt and utilize a

standard applicable under all workmen's compensation acts. Here the lawyer can render valuable assistance.

It cannot be denied that the same type of injury does not have the same consequences for all individuals. For example, the amputation of the terminal phalanx of an index finger might constitute a major handicap for a typist but a minor disability for a manual laborer.

Workmen in the same industry with the same injury and end result react differently. Social environment, mental attitudes, education, and economic status all enter into the effect of the injury upon the individual and his future. Granting that each case environmentally differs substantially from the next, is it nevertheless impossible to evaluate physical disabilities with accuracy? Is it possible to establish a uniform method of appraising disabilities when the final result of trauma shows such variations?

Much has been written on this subject. Research discloses that in selecting a standard for the evaluation of permanent disabilities the following criteria have been suggested: (1) reduction of earning capacity, (2) structural loss, (3) loss of efficiency for specific vocation, (4) cosmetic defect, and (5) ability to obtain employment. Each of the suggested standards is open to criticism.

Reduction of earning capacity would appear to be too variable a test. Individuals with severe disabilities but with seniority and skill may have small impairment of earning capacity while others with minor injuries and little ability may have a total loss of earning power. No two injured workmen are alike, and an injury which caused marked loss of earning power in one might stimulate another to work even harder to overcome the handicap and therefore increase his earnings. For these and other reasons, measurement of impaired earning capacity as a standard of determining *permanent* disability may be criticized on the ground that it would lead to inequitable and inaccurate results.

It would also appear that structural loss alone would not serve satisfactorily as a proper standard. Good function is often present with a severe deformity while severe disability may exist with a good structural condition following an injury. Although structure and function are closely related, they rarely exist in direct proportion after a serious injury.

Most experts reject vocational loss of efficiency as a criterion because it is neither equitable nor practicable.

Cosmetic defect falls short as a standard because although the defect may constitute a handicap economically and socially, its extreme variability and difficulty of measurement make it unreliable.

Likewise, ability to obtain employment is not acceptable because it is beyond the scope of actual measurement.

Most compensation laws recognize both physical and economic loss as a basis for determining benefits.

In *Disability Evaluation* by Dr. Earl D. McBride, an attempt is made to arrive at a just evaluation of permanent partial disability through a detailed analysis of the anatomical, vocational and economic results of the injury.

In his opinion, most important of all is the analysis of function, which includes (1) quickness of action, (2) co-ordination of movements, (3) strength, (4) security, (5) endurance, (6) safety as a workman, and (7) prestige of normal physique in obtaining or pursuing employment. Each of these factors is assigned its special rating as applied to 100% capacity. By physical examination, the loss related to each factor is estimated and the total computed.

A "functional measuring rod" is thus worked out as a guide for the studying of functional losses. This very elaborate procedure is intended to provide a scientific and objective basis for disability evaluation in individual cases. Dr. McBride's method represents one possible solution of this difficult problem, but it is rather complicated and requires specialized training of the physician.

Dr. Henry H. Kessler, in his authoritative work entitled *Accidental Injuries (The Medico-Legal Aspects of Workmen's Compensation and Public Liability)*, suggests that the method adopted for evaluating permanent partial disability should be practical, uniform, accurate, and not affected by the variations of the disability. As a solution to this vexing problem, he recommends that functional loss be adopted as the sole standard on the ground that it alone satisfies the fundamental requirements of accuracy, uniformity, practicability and stability and is the keynote to the vocational and economic ability of the injured workman.

He stresses the necessity for uniformity in defining "function" and insists that the

criterion must be objective rather than subjective. Therefore, he first defines permanent disability as the end result of an injury after all treatment has been completed and sufficient time has elapsed for the effects of injury to subside by natural means, and refers to this period as one of *consolidation*. According to most authorities, the period of consolidation exists when the approximate degree of permanent disability can be recognized, when there is no further improvement with treatment, when the functional and structural modification from the healing of the tissues is stationary, and when return to work is possible without danger to the patient.

Dr. Kessler analyzes the function of the upper extremity and concludes that it resolves itself into three factors: (1) motions of the joints, (2) strength of the muscles, and (3) co-ordination and control of them from the brain. He argues that the measurement of these components gives an index to the function of the upper extremity as an indicator of its value as a work unit.

Parenthetically, he points out that the endless variety of the end results of injuries is no obstacle in the determination since the method is the same. The sole aim is to measure the *function* of a disabled arm after an injury. Therefore, the age of the patient does not affect the accuracy of the method because any difference in the effect of the injury on an older person as compared with a younger one always manifests itself in loss of function which is the factor to be measured.

Dr. Kessler emphasizes the importance of utilizing an accurate technique for measuring loss of motion in an upper extremity. He suggests that only three major joints of the arm should be taken into consideration—the shoulder, elbow and wrist. The range of motion in these joints should be compared individually to the range of motion of the respective joints in the opposite normal arm. For example, if the injured right shoulder has active abduction to 90°, and the left shoulder 180° for the same motion, there is an obvious loss of 50% in the abduction movement of the right shoulder. This should be considered as a loss of motion for the whole joint. If other motions are involved, they too may be compared with similar movements of the opposite arm. Dr. Kessler recommends, however, that only one movement be used as an index to the loss of motion for that joint, the one with the maximum loss.

He recognizes that from a vocational point of view one joint may be of greater importance than others; but since it is impossible to determine which is worth more from a functional standpoint, an equal value should be assigned to each one. In the arm illustration, therefore, the 50% of loss of abduction would represent a loss of 17% of the entire motion of the arm, being 50% of 33 1/3%, (the shoulder representing an equal third of the entire motion of the arm). He suggests that the same method be applied if more than one joint is involved, by combining the percentage of loss in two or more joints.

The next function to be studied is the loss of muscular strength. Dr. Kessler suggests that the dynamometeric method be used. He prefers the use of the spring balance which has been, in his opinion, more successfully used.

Referring to the factor of co-ordination, Dr. Kessler points out that the efficiency of the muscle depends not only on its strength but also upon its ability to respond to a nerve stimulus which directs it into the proper channel. He states that co-ordination is intimately connected with dexterity and speed, and that satisfactory tests for these conditions have been devised.

For the sake of illustration, Dr. Kessler assumes that the injured arm has a loss of motion of 17%, loss of strength of 11%, and loss of co-ordination of 8%. Just as it is impossible to say which joint is of greatest importance physiologically and for the routine pursuits of life, so must an equal value be ascribed to the three factors of motion, strength, and co-ordination.

He suggests that the functional loss of the arm radical is equal to the *maximum loss* of any one of its component factors. Thus, in the above case the maximum loss would be 17% represented by the motion factor.

In discussing the hand radical, Dr. Kessler states that the normal hand has four principal functions: hook, ring, forceps and pliers. After analyzing those four activities of the hand, he concludes that the hand function can be divided into three parts, all of which are based on the fundamental factors of motion, strength and co-ordination. If a value were put on each of those three units of function, they would be about equal. More or less arbitrarily he determines that the value of the thumb in

apposition to the tips of the fingers represents 40% of the function of the hand. The grasping power of the fingers for small objects represents 30%, and the grasping power for large objects between the fingers and palm 30%. The end result of the injury can be measured by this proposed method to the extent to which these three factors are affected.

The same method described for measuring the function of the hand is applied in estimating disability of individual fingers.

Dr. Kessler points out that although it is possible for movements of the hand to be carried out without motion taking place in the three major joints of the upper extremity, still the hand would be limited in the sphere of its usefulness by inability to gain access to objects to be grasped. Therefore, since the radicals of the arm and hand are dependent one upon the other to almost the same degree, and since one would be useless without the other from a functional standpoint, the disability of the entire upper extremity should depend upon the maximum disability of either radical. He gives as an example a case where the arm radical suffered a loss of function of 24% and the hand radical of 40%, resulting in a disability of the extremity of 40% which is the *maximum* of the two disabilities.

Dr. Kessler suggests that the principles used in evaluating the permanent disability of an upper extremity are equally applicable to back injuries. He takes as his premise the proposition that function is expressed in strength and in motion, and suggests that in appraising loss of motion and loss of strength the measurement should be confined to determining the degree of impairment of motion in the trunk.

In the cervical region, he contends, strength is a negligible factor, and motion is of major importance. He reasons that since cervical motion plays no part in trunk motion, it should be considered separately and be given an arbitrary value of 1/3 of that of the trunk region.

It is, of course, recognized that the use of functional loss as a standard for evaluating permanent disabilities, as suggested by Dr. Kessler and others, is not the perfect answer to this problem. We know that the percentage of permanent partial disability cannot be measured with mathematical accuracy; however, that standard would in large measure satisfy the requirements of reasonable accuracy, uniformity and practicability.

If a uniform method were adopted, it would enable the members of the medical profession, who testify before commissions and courts to explain logically the grounds upon which their opinions are predicated and to demonstrate the method by which the percentage of permanent disability was determined. Thus, the effectiveness of such witness would be greatly enhanced. No longer would the medical profession be forced to rely upon a guess and dignify it by calling it an opinion.